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DECLARING PORTIONS OF THE DELAWARE RIVER TO BE NONNAVIGABLE

HEARING

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

JULY 29, 1988

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DECLARING PORTIONS OF THE DELAWARE RIVER TO BE NONNAVIGABLE

FRIDAY, JULY 29, 1988

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC.

The committee met, pursuant to notice, at 10:07 a.m., in room 406, Dirksen Senate Office Building, Hon. Robert Stafford [acting chairman of the committee] presiding.

Present: Senators Stafford and Pressler.

Also present: Senators Specter and Heinz.

Senator **STAFFORD**. The Committee on Environment and Public Works will please come to order.

As a first note, let me say that the chairman of the full committee, Senator Burdick, is managing the agricultural appropriations bill on the floor of the Senate. For that reason he is unable to be here.

I do have a prepared statement from Senator Burdick which will be included in the record of this hearing at this point.

[Senator Burdick's statement follows:]

OPENING STATEMENT OF HON. QUENTIN N. BURDICK, U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

The Committee on Environment and Public Works meets this morning to consider a proposal by Senator Arlen Specter to declare portions of the Delaware River in the vicinity of Philadelphia nonnavigable.

I welcome this opportunity to receive testimony on the issue of navigation servitude in general, and on this proposal in particular. I know it is great importance to Senator Specter and to the city of Philadelphia.

Senator **STAFFORD**. In the meantime, as the one-time chairman of this committee, I have undertaken to play a role I did for six years and allow the committee to go ahead.

So, I am very pleased to be here and to listen to the witnesses in connection with this matter affecting the waterfront at Philadelphia and questions of navigational servitude in connection with it. I am particularly glad, on behalf of the committee and its members who have other commitments this morning, to welcome my friend and the very distinguished Senator from Pennsylvania, Senator Specter, to be the first witness.

Senator, when you have concluded, I would invite you to assume any seat up here you care to and join me for the balance of the hearing.

STATEMENT OF HON. ARLEN SPECTER, U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you very much, Mr. Chairman.

At the outset, let me express my personal appreciation and the appreciation of my colleague, Senator Heinz, who is otherwise engaged at the moment but may be joining us for this hearing on what we consider to be a very important matter for Pennsylvania and, specifically, the Philadelphia port.

It may be worthwhile for just a moment, Mr. Chairman, to focus on the procedural status of this issue, because there is considerable time urgency on our efforts to have this issue of the navigable servitude resolved. The matter came before the Senate in the Appropriations Subcommittee. At that time, there was a concern that the authorizing Committee on Environment and Public Works had not had an opportunity to review this matter.

I then consulted with the chairman, Senator Johnston, and the ranking member, Senator Hatfield, of the Appropriations Subcommittee and you, Mr. Chairman, and also Senator Burdick on the Senate floor, and we worked out this procedure where a hearing would be held by the authorizing committee. Then, if the consent of the authorizing committee were obtained, we would then proceed to try to put this matter on another appropriations bill without respect to having the precise one involved, but we could get that sort of accommodation so that if it is approved substantively, we could move ahead to get the issue resolved before the end of this fiscal year.

We hope to have all the appropriations bills completed, or perhaps some will be caught in the continuing resolution. In any event, we wish to try to move the matter ahead in this time frame.

So, it is especially appreciated that the committee has scheduled this hearing at this early date. And it is an early date, because we took these matters up in June on the appropriations bill, and here we are in July with a hearing working on this relatively time frame.

Mr. Chairman, on the substance, we have organized, I think, substantive testimony which will establish in a reasonably conclusive way the very substantial public interest of the City of Philadelphia, the Commonwealth of Pennsylvania, and the United States of America in having this navigable servitude waived on a very extensive development of the Philadelphia waterfront in a way which, number one, does not affect at all navigation and, secondly, has very material factors which establish a clear-cut public interest.

To establish that, we have the key representative from the City of Philadelphia, the Director of Commerce, here today. We have the key man from the Philadelphia Industrial Development Corporation and the key man from the Philadelphia Port Authority. We also have the individuals who are moving ahead with the private development.

Mr. Chairman, this is a plan, and there has been an effort made to have the navigable servitude waived so that there can be six very important developments which will be undertaken pursuant to a plan which was established by the City of Philadelphia, the City Planning Commission, back in 1982.

I have conferred with the Honorable John Doyle, Esquire who is here from the Department of the Army, the official from the Secretary's office who has charge of this matter, and we have established the parameters as to what we expect the committee to be looking at in the issue of public interest.

Without taking any substantial additional time—and I appreciate the chairman's invitation for me to join the panel even though I am not a member of this particular committee, I may be able to be helpful in developing some of the factual record—we have prepared, and I thought it would be useful if we had a few photographs, and the pictures tell more than 1,000 words.

So, at this juncture, I would like to point to just three pictures which establish the case.

This is a before picture, and this is an after picture on what has been done with the elimination of navigable servitude.

Senator STAFFORD. Could you identify the location, Senator, with respect to the area that is the subject of this inquiry this morning?

Senator SPECTER. I can do that, Senator Stafford, with this map. There has already been development on this waterfront area with the release of the navigable servitude in 1972. That is the area marked in red.

Senator STAFFORD. And the area you are pointing to is on the west side of the river and is Philadelphia with Camden, New Jersey on the other side?

Senator SPECTER. Yes. This is Camden; this is Philadelphia.

Senator STAFFORD. Thank you.

Senator SPECTER. This is the Benjamin Franklin Bridge. The part marked in red establishes the release of the navigable servitude in 1972 which has enabled the development of substantial waterfront, Penn's Landing, to be built which is a magnificent area and has very substantial development. It is a showcase for the City of Philadelphia. The Tall Ships come there. It attracts an enormous number of tourists. People have fun, jobs are created, revenue is created, and it is a remarkable use of that historic site where Philadelphia was formed.

Just five blocks up the street, there is Independence Hall, the Liberty Bell, and the great historical treasures of the United States where the Constitution was adopted.

The development here had been old, dilapidated, and forlorn, and it has had a great revival in the City of Philadelphia.

The parts where we seek the waiver of the navigable servitude are those marked in yellow. As you can see, Mr. Chairman, there is not really a great deal of space involved. They are all on piers which are defunct.

Senator STAFFORD. They are at three different locations, are they?

Senator SPECTER. There are four.

Senator STAFFORD. I see.

Senator SPECTER. There will be a fuller demonstration by the witnesses, but I wanted to bring your attention to two pictures. This is a before picture which shows the area around that pier. This is the way it appears today with the beautiful marina and expansive development. There will be testimony as to the specifics.

The other picture that I wanted to call to your attention is a prospect. May the record show that there is an artist's rendering of the three residential high-rise towers and an out to the pier with stores and restaurants which will be described more fully.

Here, it appears today. This is a photo showing an extended pier which is decrepit, unused, dark, forlorn, and a waste.

That is the overview, Mr. Chairman. I thought it might be helpful for an opening statement, as we sometimes do, to make that very first presentation which will be, I think, helpful in having the committee follow the outline of testimony which the witnesses will be presenting.

Senator **STAFFORD**. It is very helpful, Senator Specter.

Looking at the artist's concept, I assume that one tower building of some height and a series of other buildings of lesser height are going to be built where the decrepit pier appears in the actual photograph. Is that correct?

Senator **SPECTER**. Yes, that is right, Mr. Chairman. And it is all a part of the integrated whole.

There is no loss to the United States Government, because the piers are not used and cannot be used because of the development of the port. The purposes for those piers have long since passed, and there is an obvious attractive projection there which will bring tax revenues to the Federal Government and the State and the city and provide a great many jobs, entertainment, and a place for people to live in a beautiful setting.

Senator **STAFFORD**. The new construction where the pier has been would not extend beyond the present pier?

Senator **SPECTER**. I believe that is correct.

Senator **STAFFORD**. Thank you very much, Senator.

We will now go ahead with the first witness, the Honorable John Doyle, Jr., Principal Deputy Assistant Secretary of the Army for Civil Works.

Welcome, Mr. Doyle.

STATEMENT OF HON. JOHN S. DOYLE, JR., PRINCIPAL DEPUTY ASSISTANT SECRETARY OF THE ARMY FOR CIVIL WORKS

Mr. **DOYLE**. Thank you, Senator.

Mr. Chairman, Senator Specter, I am, as the chairman indicated, John Doyle, Principal Deputy Assistant Secretary of the Army for Civil Works. I am pleased to appear before you here this morning to testify on the navigation servitude and statutory declarations of non-navigability and the proposed declaration of non-navigability for the Delaware River at Philadelphia.

The term "navigation servitude" describes the sovereign power of the Federal Government in the navigable waters of the United States. It amounts to the right to take, damage, or destroy private property without compensation when the Federal Government is acting in the interest of navigation and the property is located within the navigable waters of the United States.

The navigation servitude arises under the Commerce Clause of the Constitution.

The property that is subject to the servitude may be used by its owner for any lawful purpose. At any time, however, the United

States may exercise its power, under the navigation servitude to take property in the interest of navigation without paying compensation or to compel the property owner to remove any obstructions to navigation on the property at no cost to the United States.

In furtherance of its responsibilities under the navigation servitude, the Department of the Army administers three important regulatory programs which cover various activities in the navigable waters, and those are sections 9 and 10 of the Rivers and Harbors Act of 1899 and section 404 of the Clean Water Act on which the chairman is one of the country's experts.

Declarations of nonnavigability generally extinguish the navigation servitude and our authority under sections 9 and 10 of the Rivers and Harbors Act unless the regulatory authority is expressly reserved.

Typically, the Army is not asked whether it supports a proposed declaration of nonnavigability but, rather, whether it has any objection to it. The Army will normally raise an objection unless one of four criteria are met:

The proposed development does not obstruct the current or anticipated navigation channel or otherwise interfere with current or projected needs of navigation; secondly, the declaration is limited to the property proposed for development and only those portions of the property which have been or will be converted to fast lands through lawful means; third, the declaration of nonnavigability is made contingent upon the granting of all necessary Federal permits; and, fourth, that the proposed development will serve a useful public purpose.

I won't go into a summary of the Delaware proposal. Senator Specter did that very well, and I know other witnesses will do so also. The details of the project in terms of its description, the number of sites involved, and the number of proposed projects at those sites are spelled out in the written testimony.

All of those areas involved in the Delaware proposal are very near a heavily used navigation channel, but, as was indicated, are within the pierhead line as it currently exists. This does cause me some concern. Yet, based on the information presented to date and made available to us, we don't expect the proposed developments to interfere with current navigation, nor are they expected to interfere with navigation in the near future.

As you know, these proposed projects have not been evaluated yet for Department of Army permits. Therefore, I believe it is premature for us to express any judgment in regard to whether or not those permits will be issued or in what fashion.

At this juncture, it does appear, though, that the proposed developments are primarily private developments. As Senator Specter indicated, we will have an opportunity during this hearing and afterwards to explore that question, but based on an understanding up to this point that they are private developments primarily or at least only indirectly producing public benefits with public purpose, the Department of Army has chosen to object to the proposed declaration of nonnavigability at least based on what is known to date.

In conclusion, as a general rule, we believe it is far better to allow the Federal permit processes to be completed before decisions are made concerning non-navigability. However, we understand the prerogatives of Congress on the matter and urge that in the event a determination of nonnavigability is made prior to the issuance of required permits that the determination be made contingent upon receiving such permits and that the determination apply only to those areas which have been or will be filled by some lawful methods.

Mr. Chairman, that concludes the summary of my statement. I would be happy to answer any questions that you may have.

Senator **Stafford**. Thank you very much, Mr. Doyle.

I do have a few questions, and we will get right to them.

First of all, in the pictures that have been placed in front of the committee, one of them showed a considerable amount of prior development in Philadelphia in which I understood Senator Specter to say that the issue that the burden of nonnavigability had been lifted as far as those developments were concerned. In fact, is that true in your understanding?

Mr. **Doyle**. Yes, sir. In the area that was marked with the red tape in the picture that the Senator showed, there has been development that has taken place following the congressional declaration of nonnavigability for that portion in 1972.

Senator **Stafford**. So, there is a precedent in that area for taking this action should the committee and the Congress decide it wise to do.

Mr. **Doyle**. Yes, sir, there is, though I would be remiss if I didn't point out that, procedurally, we may be in a somewhat different place 16 years ago with respect to this proposal than the Congress was in 1972. If I may, I will take a moment to explain what I mean.

There had been an environmental impact statement prepared, as I understand it, in connection with the 1972 proposal prior to Congressional determination on whether the declaration should be pronounced legislatively. That is not the case here in connection with this proposal.

Senator **Stafford**. Would you know, Mr. Doyle, whether or not any question was ever raised as to the constitutionality of an Act of Congress eliminating the navigational servitude in a specific area?

Mr. **Doyle**. I am unaware of whether the constitutionality of any specific declaration has ever been challenged. It is my understanding that there have been 73 congressional declarations in 93 years, and with your permission, Senator, I would like to review the history of those and give you a definitive answer for the record.

Senator **Stafford**. Certainly. There does appear to be some body of thought that the concept of navigational servitude is something that the Congress might not be empowered to give away even if it wished to. Apparently there are no cases available to us this morning, but if you did have the time to examine that, we would appreciate a viewpoint on it.

Mr. **Doyle**. Yes, sir, I would be happy to. There is no congressional declaration, in my understanding, of the 73 that we are aware of that has ever been struck down as being unconstitutional.

Senator **Stafford**. And that one has been there now for 16 years.

[Information requested follows:]

Based upon our review of the records, the constitutionality of declarations of nonnavigability has not been challenged in court.

Senator STAFFORD. Do you know of any case, Mr. Doyle, where waterfront development has gone forward on the Delaware River or any other navigable river without the benefit of a congressional declaration of nonnavigability?

Mr. DOYLE. Senator, there have been numerous instances of development taking place throughout this country on navigable waters without the benefit of the navigation servitude having been struck by Congress legislatively. I would be glad to provide some examples for the record.

[Information referred to follows:]

Over the last 93 years, there have been 73 declarations of nonnavigability that we have been able to identify. During this same period, the Army Corps of Engineers has, by rough estimate, issued 250,000 permits for activities along the navigable waters of the United States. Obviously, the vast majority of these permitted activities were undertaken without the benefit of a congressional declaration. A sampling nation-wide of these permitted activities reveals that most of the permits were for relatively minor bulkheading and fill activities.

Senator STAFFORD. This is not pertinent to this morning's discussion, but I recall many years ago when I was Vermont's Attorney General being involved in an issue affecting one of our power companies, and the question of navigability from the Federal standpoint of a river feeding Lake Memphremagog came up. We were able at that time to prove, to my surprise, that if you could float logs down a river in the spring and a canoe could travel the river, it was a navigable waterway from the Federal standpoint.

So, I suppose it would be possible to build something on a river of that kind without regard to the navigational implications of navigable servitude, but that is an aside as far as this is concerned.

Mr. DOYLE. Yes, sir. The concept of navigation servitude and the navigability requirement has been defined by the Supreme Court over the course of 160-some years and looks well beyond the question of whether a body of water is currently navigable in fact.

Senator STAFFORD. Do you believe that a Corps study of the issue of navigation servitude could yield further valuable information and suggestions as to how this problem might be addressed in the future?

Mr. DOYLE. Potentially, Senator, although I am not at all convinced that such a study would be the best use of time and resources.

Senator STAFFORD. Would all of the proposed Delaware River developments require Corps of Engineers section 10 and section 404 permits? If so, could you make any estimate as to how long this process might take?

Mr. DOYLE. Senator, at this point, we can't determine if all of the proposals would require permits. It is my expectation, based on the understanding we now have, that at least a good portion would.

Looking at our program on a national level, I would say it would take between three months and a year, in all likelihood, to make those permit decisions. Again, that is just based on a national average.

Senator STAFFORD. In your statement, as you noted, the Army opposes the nonnavigability declaration because the planned developments yield primarily private benefit. Could you comment, Mr. Doyle, on what types of developments the Army would consider to be creating a public benefit?

Mr. DOYLE. Yes, sir, I would be glad to. Again, I need to emphasize that our present determination is one that is made with limited information. To the extent that it can be demonstrated that the proposed developments on the Delaware River will produce public benefits, we would be willing to reconsider our position.

There is no direct and conclusive definition of public benefit. I think it is probably like beauty; it will be something different to each of us. The more public the benefit, the easier it will be for the Army to raise no objection.

Examples come to mind of a public park, for instance, or a publicly-owned water treatment works.

Senator STAFFORD. One final question. In connection with our navigable waterways around the country, there probably is increasing nonindustrial development along many of them with the construction of housing, office buildings, stores, and so on along the waterfronts. Do you know of any instance where that kind of construction similar to what we are talking about today has indeed interfered with navigation on our federally navigable waters?

Mr. DOYLE. I don't have a specific example I can give you right here, Senator. I am certain that in the hundred years or so that we have been looking at these questions that there have been cases where structures have been erected that were erected in an unlawful fashion and did in fact interfere with navigation. I would be glad to have our people take a look and get some examples for you.

Senator STAFFORD. We would appreciate that.

[Information referred to follows:]

Over the last 93 years, there have been 73 declarations of non-navigability that we have been able to identify. During this same period, the Army Corps of Engineers has, by rough estimate, issued 250,000 permits for activities along the navigable waters of the United States. Obviously, the vast majority of these permitted activities were undertaken without the benefit of a Congressional declaration. Most of these permits are for the creation of new channels and filling activities.

Activities in navigable waters are subject to Corps regulatory review pursuant to Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act. The Corps permit program is designed to insure that development is compatible with the needs of navigation. Applications for permits are subject to public review and comment as well as a thorough review by the Corps and other Federal and State agencies. Concerns with individual development are normally raised during this review process. During this review process the Corps insures that these concerns are addressed and affords an opportunity to resolve them. This process is essential in protecting the welfare of the public.

Senator STAFFORD. Mr. Doyle, for the committee, you have my thanks. Members of the committee who can't be here this morning may have questions they would like to address to you in writing. If that were agreeable to you, at your earliest convenience, you might respond to them to the committee.

Mr. DOYLE. Absolutely.

Senator STAFFORD. The Chair is about to yield to my friend, Senator Specter. However, before I do, I see the other very distinguished Senator from Pennsylvania is also here.

Senator Heinz, did you have any statement you wanted to make before we recognize Senator Specter for questions?

Senator **Heinz**. Mr. Chairman, no. I just want to thank you, Mr. Chairman, for having this hearing on an issue of great importance to Philadelphia. The Port of Philadelphia, indeed, is the life blood of the economy of our southwestern Pennsylvania region. It is tremendously important that it be effectively developed.

The issues here bear directly on the ability of the city and all interested parties to effectively develop the river front area, as the very good presentations made have indicated, and I think this hearing will measurably impact our ability to move ahead and achieve those modifications in government regulation that are necessary and which, if and when changed, will permit appropriate development of what we hope is the highest and best use of the land and facilities and potential that is involved here.

So, I just want to express my appreciation to the committee for scheduling this hearing.

Senator **Stafford**. Thank you, Senator.

Senator Specter, if you have questions, we will be glad to have them.

Senator **Specter**. Thank you very much, Mr. Chairman. Thank you for inviting me to join you and for the opportunity to ask questions. I shall be brief, but I think there are a few points that I could develop which would be helpful.

Mr. Doyle, I appreciate your availability to talk to me yesterday. We did so by phone about this issue and the concerns and factors which the Department of the Army and the Corps of Engineers has in mind.

I can understand the, what I think will be, tentative opposition which has been registered by the Corps until you see the development. I am confident that when the witnesses have testified as to the full range of what will be developed here that it will be at least on a par if not surpassing the 1972 developments which I think have satisfied the public interest issue.

However, that will remain to be seen, and I know that you await that evidence and have an open mind on that particular issue.

You had referred to a difference between 1972 and the present time with environmental impact statements. To my understanding, that factor has not been raised as a concern at the present time. So, I was wondering if, while that is a difference between then and now, if it really goes to any of the underlying merits of the situation today.

Mr. **Doyle**. I didn't mean to indicate that it did or didn't, Senator, only to indicate that having gone through the crucible of the environmental impact statement process, there was a different kind of opportunity that the Congress had available in 1972 to judge the public interest than it does here today. I wasn't making judgments one way or the other.

Senator **Specter**. Well, it may be that the conclusions reached with respect to the environmental impact study and the developments which followed in 1972 which are really identical to what we are doing now would have resolved that issue, and I think there will be some testimony on that point. I see one of our prominent witnesses nodding in the affirmative, so we will be hearing about that.

I think it might be useful, Mr. Chairman, if we put in the record a list of U.S. statutes declaring certain waters nonnavigable, some 71 of them which we have been able to find. Mr. Doyle made reference to 73, but I believe that establishes a very solid precedent for this congressional declaration in the past.

On that subject, Mr. Doyle, we were talking informally a few moments ago——

Senator **Stafford**. Senator, do you want that in the record?

Senator **Specter**. Yes, please.

Senator **Stafford**. Without objection, we will place it in the record.

Senator **Specter**. Thank you very much, Mr. Chairman.

[The material referred to follows:]

SOURCE: REID & PRIEST

U.S. STATUES DECLARING CERTAIN WATERS NON-NAVIGABLE

The following is a chronology of the U.S. Code sections which declare certain waters non-navigable. Included in each entry is the statutory language which establishes non-navigability and any statutory qualification to the declaration.

1894

1) Iowa River, Iowa--north of the town of Toolsboro.

"shall not be deemed a navigable river or public highway, but bridges and dams may be constructed across it." 33 U.S.C.A. § 31.

1900

2) Cuivre River, Missouri--within Lincoln and St. Charles Counties.

"declared not to be a navigable stream." 33 U.S.C.A. § 29.

1901

3) Mississippi River (West Channel), Wisconsin--between Grand Island and the mainland opposite the city of LaCrosse, Wisconsin.

"declared unnavigable." 33 U.S.C.A. § 35.

1904

4) Osage River, Missouri--portions within Benton County as described in the statute.

"declared not to be a navigable stream." 33 U.S.C.A. §41.

1905

5) Grand River, Missouri--above the city of Brunswick in Chariton County.

"declared to be not a navigable stream." 33 U.S.C.A. § 30.

1910

6) Big Tarkio River, Missouri--in Holt and Atchison Counties.

"declared to be not a navigable water....The right to alter, amend, or repeal this section is expressly reserved." 33 U.S.C.A. § 24.

7) Nodaway River, Missouri--in Andrew, Holt, and Nordaway Counties.

"declared to be not a navigable water....The right to alter, amend, or repeal this section is expressly reserved." 33 U.S.C.A. § 37.

8) One Hundred and Two River, Missouri--within Andrew County.

"declared to be not a navigable water....The right to alter, amend, or repeal this section is expressly reserved." 33 U.S.C.A. § 40.

1913

9) Calumet River, Illinois--portions of the "old channel" within Cook County as described by statute.

"abandoned as navigable water...after the time when the United States shall have secured title to the land necessary for the establishment of a turning basin." 33 U.S.C.A. § 26a.

10) Mill Slough, Oregon--within the limits of the city of Marshfield.

"declared to be not a navigable waterway." 33 U.S.C.A. §34.

1915

11) Calumet River, Illinois--additional portion of the "old channel" within Cook County as described by statute.

"abandoned as navigable water." 33 U.S.C.A. § 26.

12) Swan Creek, Ohio--a stream within the city of Toledo.

"declared to be not a navigable waterway." 33 U.S.C.A. § 45.

1916

13) Cache River, Arkansas.

"declared to be a nonnavigable stream....The right of Congress to alter, amend, or repeal this section is expressly reserved." 33 U.S.C.A. § 25.

14) Crum River, Delaware Bay--portions of the river, as described by statute, in existence prior to the construction of a new channel.

"shall be abandoned and vacated when the above-mentioned new channel [is completed as specified herein]" 33 U.S.C.A. § 28.

15) Oklawaha River, Florida--portions as described by statute.

"Upon the conveyance to the United States [of a certain canal and lands to the east of the canal], the said canal...shall become a free public waterway...in place of the natural bed of the river." 33 U.S.C.A. § 38.

1917

16) Bayou Meto, Arkansas.

"declared to be a nonnavigable stream." 33 U.S.C.A. § 22.

17) Mosquito Creek, South Carolina--in Colleton County.

"declared to be a nonnavigable stream." 33 U.S.C.A. § 36.

18) Ollala Slough, Oregon--that portion within Lincoln County as described by statute.

"declared to be a nonnavigable stream." 33 U.S.C.A. § 39.

19) Saint Marys River, Ohio and Indiana.

"declared to be a nonnavigable stream." 33 U.S.C.A. § 43.

1919

20) Little River, Arkansas--from Big Lake in Mississippi County to Marked Tree in Poinsett County.

"declared to be not a navigable waterway." 33 U.S.C.A. § 33.

1921

21) Bayou Cocodrie, Louisiana--from its source to its junction with Bayou Chicot.

"declared to be not a navigable water....The right to alter, amend, or repeal this section is expressly reserved." 33 U.S.C.A. § 21.

22) Platte River, Missouri.

"declared to be a nonnavigable stream....The right of Congress to alter, amend, or repeal this section is expressly reserved." 33 U.S.C.A. § 42.

1922

23) Lake George, Mississippi.

"declared to be not a navigable water....The right of Congress to alter, amend, or repeal this section is expressly reserved." 33 U.S.C.A. § 32.

24) Tchula Lake, Mississippi.

"declared to be a nonnavigable stream....The right of Congress to alter, amend, or repeal this section is expressly reserved." 33 U.S.C.A. § 46.

1923

25) Bear Creek, Mississippi--in Humphreys, Leflore, and Sunflower Counties.

"declared to be a nonnavigable stream....The right of Congress to alter, amend, or repeal this section is expressly reserved." 33 U.S.C.A. § 23.

26) Chicago River, Illinois--portion in Cook County as described by statute.

"[this portion is] declared to be a nonnavigable stream....The right of Congress to alter, amend, or repeal this provision is expressly reserved." 33 U.S.C.A. § 27.

1924

27) Chicago River, Illinois--certain portions in the city of Chicago as described by statute.

"As soon as...a new channel [for this portion of the river is constructed,] so much of the [old] channel as shall be superseded and replaced by said new channel in accordance with the permit of the Secretary...shall be discontinued and abandoned." 33 U.S.C.A. § 27.

1926

28) Eagle Lake, Louisiana and Mississippi.

"declared to be a nonnavigable stream....The right to alter, amend, or repeal this section is expressly reserved." 33 U.S.C.A. § 47.

1934

29) Noxubee River, Mississippi--that portion in Noxubee County.

"declared to be a nonnavigable stream....The right of Congress to amend or repeal this section is expressly reserved." 33 U.S.C.A. § 48.

1935

30) Chicago River, Illinois--portions as described by statute.

"declared to be a nonnavigable stream....The right to alter, amend, or repeal this section is expressly reserved." 33 U.S.C.A. § 27a.

31) East River, Wisconsin--portions within Brown County as described by statute.

"declared to be a nonnavigable stream....The right of Congress to alter, amend, or repeal this section is expressly reserved." 33 U.S.C.A. § 29a.

1936

32) Bayou St. John, Louisiana--within the city of New Orleans.

"declared to be not a navigable water....The right to alter, amend, or repeal this section is expressly reserved." 33 U.S.C.A. § 49.

1937

33) Calumet River, Illinois--portion in Cook County as described by statute.

"is a nonnavigable stream....The right to alter, amend, or repeal this section is expressly reserved." 33 U.S.C.A. § 26b.

34) Turtle Bay and Turtle Bayou, Texas.

"declared to be nonnavigable waterways....The right of Congress to alter, amend, or repeal this section is expressly reserved." 33 U.S.C.A. § 50.

35) Scajaquada Creek, New York--portion as described by statute.

"declared to be nonnavigable....The right to alter, amend, or repeal this section is expressly reserved." 33 U.S.C.A. § 51.

36) Park River, Connecticut.

"declared to be a nonnavigable waterway....The right of Congress to alter, amend, or repeal this section is expressly reserved." 33 U.S.C.A. § 52.

37) Benton Harbor Canal, Michigan--portion in the city of Benton Harbor as described by statute.

"declared to be not a navigable water....The right to alter, amend, or repeal this section is expressly reserved." 33 U.S.C.A. § 53.

38) Burr Creek, Connecticut--portion in the city of Bridgeport as described by statute.

"declared to be not a navigable water....The right to alter amend or repeal this section is expressly reserved." 33 U.S.C.A. § 54.

39) Bayou Savage, Louisiana--in the city of New Orleans.

"declared to be a nonnavigable waterway....The right to alter, amend, or repeal this section is expressly reserved." 33 U.S.C.A. § 55.

1947

40) Kenduskeag Stream, Maine.

"declared to be a nonnavigable waterway." 33 U.S.C.A. § 59p.

1955

41) Fort Point Channel and South Bay, Boston, Massachusetts--portions as described by statute.

"declared to be a nonnavigable water....The right to alter, amend, or repeal this section is expressly reserved." 33 U.S.C.A. § 56.

42) Pike Creek, Wisconsin--portion as described by statute.

"declared to be a nonnavigable stream....The right to alter, amend, or repeal this section is expressly reserved." 33 U.S.C.A. § 57.

43) Acushnet River, Massachusetts--portion in the city of New Bedford and towns of Fairhaven and Acushnet as described by statute.

"declared to be a nonnavigable water....Any project heretofore authorized by an act of Congress...[which] relates to the above-described portions of the Acushnet River...is abandoned. The right to alter, amend, or repeal this section is expressly reserved." 33 U.S.C.A. § 58.

44) West River Connecticut--portion in the town of West Haven and the City of New Haven as described by statute.

"declared to be a nonnavigable water....Any project heretofore authorized by an act of

Congress...[which] relates to the above-described portion...is hereby abandoned. The right to alter, amend, or repeal this section is expressly reserved." 33 U.S.C.A. § 59.

1957

45) Back Cove, Maine--portion at Portland as described by statute.

"declared to be a nonnavigable water....That portion of the...Federal project [described herein]...is abandoned. The right to alter, amend, or repeal this section is expressly reserved." 33 U.S.C.A. § 59a.

1959

46) Chicago River, Illinois--portion in the city of Chicago as described by statute.

"declared to be and is on and after September 1, 1959 to be regarded as a nonnavigable water....Provided, that plans for a suitable bulkhead to retain any fill to be placed in the waterway shall be submitted to and approved by the Corps of Engineers, United States Army, prior to the placing of such fill." 33 U.S.C.A. § 27b.

47) Bayous Terreboune and LeCarpe, Louisiana--portions in the city of Houma as described by statute.

"declared to be not navigable waters....The right to alter, amend, or repeal this section is expressly reserved." 33 U.S.C.A. § 59b.

1963

48) Benton Harbor Canal, Michigan--additional portion in the city of Benton Harbor as described by statute.

"declared to be not a navigable water." 33 U.S.C.A. § 53a.

1965

49) East River, New York--portion in New York County as described by statute.

"declared to be not a navigable water." 33 U.S.C.A. § 59c.

50) River Raisin, Michigan--"old channel" portion in Monroe County as described by statute.

"declared to be not a navigable stream." 33 U.S.C.A. § 59d.

1967

51) Bayou Lafourche, Louisiana--portion between city of Thibodaux and city of Donaldsonville as described by statute.

"declared to be not a nonnavigable waterway....The right to alter, amend, or repeal this section is hereby expressly reserved." 33 U.S.C.A. § 59e.

1968

52) East and Hudson Rivers, New York--portions in New York County as described by statute.

"declared to be nonnavigable waters....This declaration shall apply only to portions of the above-described area which are bulkheaded and filled. Plans for bulkheading and filling shall be approved by the Secretary of the Army, acting through the Chief of Engineers, on the basis of engineering studies...[conducted to ensure the preservation of] the remaining navigable waterway." 33 U.S.C.A. § 59c-1.

53) Boston Inner Harbor and Fort Point Channel, Massachusetts--additional portions in Suffolk County as described by statute.

"declared to be not a navigable water." 33 U.S.C.A. § 59f.

54) Steele and Washington Bayous and Lake Washington, Mississippi.

"declared to be nonnavigable." 33 U.S.C.A. § 59g.

55) Northern Embarcadero area, San Francisco, California--area as described by statute.

"declared to be nonnavigable waters....This declaration shall apply only to portions...which are bulkheaded and filled or occupied by permanent pile-supported structures. Plans for bulkheading and filling and pile-supported structures shall be approved by the Secretary of the Army...on the basis of engineering studies [conducted to ensure the preservation of] the remaining navigable waterway." 33 U.S.C.A. § 59h.

56) Patapsco River, Maryland--portion in the city of Baltimore as described by statute.

"declared to be not a navigable stream." 33 U.S.C.A. § 59i.

1972

57) Delaware River, Pennsylvania--portion in Philadelphia County as described by statute.

"declared not to be a navigable water.....This declaration shall apply only to portions...which are filled or occupied by permanent structures. No such filling or erection of structures shall [occur]...until the plans therefor have been approved by the Secretary of the Army who shall, prior to granting such approval,...consider[ ] all factors affecting the general public interest and...the environment." Pub. L. 92-605, §§ 1-2, Oct. 31, 1972, 86 Stat. 1493.

1974

58) Wicomico River, Maryland--portion in town of Salisbury as described by statute.

"(a) If the Secretary of the Army...finds that the proposed project...is in the public interest, on the basis of engineering studies...[conducted to ensure the preservation of] the remaining navigable waterway and on the basis of environmental studies conducted pursuant to the National Environmental Policy Act of 1969, then those portions [herein described]...are declared to be not a navigable water....(b) This declaration shall apply only to the portions...which are bulkheaded and filled or occupied by permanent pile-supported structures. Plans for [such activity] shall be approved by the Secretary of the Army." 33 U.S.C.A. § 59k.

59) East River, New York--additional portion in New York County as described by statute.

DECLARATION SUBJECT TO THE SAME CONDITIONS SET FORTH IN ITEM 58 ABOVE. 33 U.S.C.A. § 59-2c.

1976

60) Lake Oswego, Oregon; Lake Coeur d'Alene, Idaho; Lake George, New York.

"for the purposes of section 403 [§ 10 of the Rivers and Harbors Appropriation Act of 1899] of this title the bodies of water are declared nonnavigable." 33 U.S.C.A. § 59m.

61) Hudson River, New Jersey--portions in Hudson County as described by statute.

DECLARATION SUBJECT TO THE SAME CONDITIONS SET FORTH IN ITEM 58 ABOVE. 33 U.S.C.A. § 59n.

62) Hackensack River, New Jersey--portions in Hudson County as described by statute.

DECLARATION SUBJECT TO THE SAME CONDITIONS SET FORTH IN ITEM 58 ABOVE. 33 U.S.C.A. § 59o.

1980

63) Erie Basin, Buffalo Harbor, New York--portion as described by statute.

"declared to be not a navigable water." Pub. L. 96-520, § 1, Dec. 12, 1980, 94 Stat. 3033-3035.

64) Trent River, North Carolina--portions in the city of New Bern as described by statute.

"declared to be nonnavigable waters." 33 U.S.C.A. § 59r.

65) Green River, Washington--portion as described by statute.

"For purposes of section 401 of this title [pertaining to the construction of bridges, causeways, dams or dikes], th[is] portion...is hereby declared to be not a navigable waterway." 33 U.S.C.A. § 59s.

1983

66) Burnham Canal, Wisconsin--portion as described by statute.

"declared to be not a navigable water." 33 U.S.C.A. § 59t.

1986

67) Bayou Lafourche, Louisiana--additional portion in the city of Thibodaux as described by statute.

"declared to be a nonnavigable waterway." 33 U.S.C.A. § 59e-1.

68) Caven Point, New Jersey--portion of the Hudson River in the New York Bay as described by statute.

"declared to be not a navigable water...except for the purposes of the Federal Water Pollution Control Act." 33 U.S.C.A. § 59n-1.

69) Lawyers Ditch, New Jersey--portion in the city of Newark as described by statute.

"declared to be a nonnavigable waterway." 33 U.S.C.A. § 59u.

70) Middle River, Maryland--portion within Baltimore County as described by statute.

"declared to be a nonnavigable water...for purposes of the navigation servitude....The right to alter, amend, or repeal this section is hereby expressly reserved." 33 U.S.C.A. § 59v.

71) North Basin and Jamaica Bay, New York--portions as described by statute.

"declared to be nonnavigable waters...for purposes of the navigation servitude." 33 U.S.C.A. § 59w.

Senator **Specter**. Mr. Doyle, we were discussing a proposal which had been made by the American Bar Association in 1970 to try to remove from the congressional ambit a piece by piece evaluation of navigable servitudes to leave the issue really with the Corps of Engineers. As I understand it—and I would appreciate your confirmation for the record—assuming the Congress does remove the navigable servitude, there is still extensive regulatory authority in the Corps of Engineers to act in this matter.

Perhaps I might defer for just a moment the American Bar Association issue and ask you to spell out for the record what authorities the Corps has. I understand they are extensive before permits are granted even after the navigable servitude is waived.

Mr. **Doyle**. If I may, Senator, I will answer your question in two parts. I am only generally familiar with the American Bar Association proposal of about 20 years ago. As you correctly stated, it would have given the Corps of Engineers and the Secretary of the Army the generic authority to make determinations following certain procedures.

I will be glad to provide the specifics of that proposal to you, and we can include it in the record if you and the chairman would like.

With respect to the second part of the question, regarding Corps regulatory authorities, they are primarily three-fold: sections 9 and 10 of the Rivers and Harbors Act and section 404 of the Federal Water Pollution Control Act. Whether our authority under sections 9 and 10 is affected by a declaration of non-navigability depends to a great measure on the terms of the declaration.

As I am sure you discern when you look at the 73 examples that were identified, there are a number of different approaches that have been taken in the past. Clearly, where a declaration reserves specifically the regulatory authority under sections 9, 10, and 404, that regulatory authority is preserved. Where the declaration does not specifically reserve the regulatory authority for sections 9 and 10, then that regulatory authority is extinguished by the declaration, in my understanding.

This is because sections 9 and 10 apply only to the "navigable waters of the United States". When a water is declared statutorily to be non-navigable, then sections 9 and 10 no longer apply.

Senator **Specter**. What I would like to see accomplished here is really to follow the analogy of the 1972 experience which worked out satisfactorily from all points of view. The concern is that the title companies will not refuse to give the preliminary clearance on this single issue of navigable servitude. I think the title companies are prepared to have the Corps of Engineers exercise the same kind of authority which was exercised in 1972.

So, we have that precedent in mind as a way of working it out in a practical manner. You and I discussed this yesterday, and your written statement contains the reference to the problem of the title companies.

So that the issue of navigable servitude is resolved sufficiently so that the title insurance companies will take the preliminary step, the Corps of Engineers retains the authority to do what was done in 1972 which works out. With that precedent in mind, if we follow that format, I think we will have a key which will satisfy all parties.

Mr. DOYLE. Senator, if Congress deems to exercise its prerogative and make the declaration, the kind of approach that you just described would be far preferable because it preserves our regulatory authority and could be crafted in a way to make the declaration dependent upon the granting of all necessary Federal permits. That would be far preferable to a declaration which failed to preserve our regulatory authority.

Senator SPECTER. Do you intend to stay for the hearing, Mr. Doyle?

Mr. DOYLE. I wasn't planning on it, but if you would like me to, I would be glad to, Senator.

Senator SPECTER. I think it would be helpful if you would so that we don't have to explore now the various hypotheticals or contingencies and you can hear the precise testimony which will be given and we can try to iron this out now. However, I don't think it is going to be complicated if we use the 1972 analog rather than having questions and discussions on a lot of variations which may not come into play until we see the precise testimony.

I don't think it is going to take a very long period of time, especially if I don't ask too many questions.

Mr. DOYLE. I would be glad to say.

Senator HEINZ. I was just going to endorse what Senator Specter recommended, if you can. Thank you very much. We appreciate it.

Mr. DOYLE. I'm glad to be of service, Senator.

Senator STAFFORD. Thank you both, Senator Heinz and Senator Specter.

Before you leave, Mr. Doyle, one question occurred to me. Going back to the 1972–73 developments, were those developments that would be characterized by the Corps of Engineers as public in nature or private?

Mr. DOYLE. My understanding of the situation is that the developments that took place produced sufficient public benefits to warrant a position 16 years ago of non-opposition to the granting of the declaration.

Senator STAFFORD. Thank you very much. If you can stay, as Senator Specter has suggested, we would appreciate it.

Mr. DOYLE. I would be glad to, Senator. Thank you.

Senator STAFFORD. We will move on to the panel. The panel will be consisting of Mr. William C. Hankowsky, Director of Commerce, City of Philadelphia; Mr. G. Craig Schelter, Executive Vice President, Philadelphia Industrial Development Corporation; and Mr. John P. LaRue, President, Philadelphia Port Corporation.

Gentlemen, the Chair would propose that you speak in the order in which we introduced you, if that is agreeable, but we won't insist on it. If you have a different order of presentation, the Chair would be glad to have it done that way.

So, with that preliminary, we would call upon you, Mr. Hankowsky, to begin.

STATEMENT OF WILLIAM C. HANKOWSKY, DIRECTOR OF COMMERCE, CITY OF PHILADELPHIA

Mr. HANKOWSKY. Thank you very much, Mr. Chairman, Senator Specter, and Senator Heinz.

My name is William Hankowsky, and I am Director of Commerce for the City of Philadelphia. I am here today representing the city at the request of Mayor Goode, and we appreciate the opportunity to share our thoughts on what we consider a very significant issue with regard to development of our waterfront.

I would like to point out that as Director of Commerce for the city, I sit on the City Planning Commission as well as the boards of the Philadelphia Port Corporation and the Philadelphia Industrial Development Corporation. Therefore, I have the capacity as a cabinet official within the city government to look at the sort of wide range of economic development activity and how this proposal integrates with that.

I would note that we would probably like to change order slightly and have Mr. LaRue follow me and Mr. Schelter follow him if that is agreeable to the committee.

Senator STAFFORD. That is agreeable.

Mr. HANKOWSKY. I have submitted my written testimony, but what I would like to do which I think is extremely pertinent given the prior testimony is read into the record, in fact, the language that we would propose be the subject of this committee's action later in terms of the removal of the navigational servitude. If I could, it is only a couple of sentences.

Senator STAFFORD. If I could interrupt just a second, I should have said at the outset that we would appreciate all of the witnesses stating their case orally and submitting their official texts for the record, and if you can confine yourselves to roughly five minutes, we will give you each the Calvin Coolidge award for brevity.

Mr. HANKOWSKY. I believe in brevity, so I will definitely achieve that goal.

The language which we would propose be adopted which is language, I should point out, that we have developed in cooperation with and with the assistance of the Corps is as follows:

> The portions of the Delaware River in Philadelphia County, Commonwealth of Pennsylvania that are particularly described in the metes and bounds below are hereby declared to be non-navigable waters of the United States for purposes of the navigational servitude. This does not remove or affect the Department of the Army's regulatory authorities under section 404 of the Clean Water Act of 1977 or section 10 of the Rivers and Harbors Act of 1899.

So, we are clearly sympathetic to the Corps' position that they should remain and have the ability to provide the regulatory controls that are clearly their prerogative. We believe, in fact, they have very well done that along the Delaware River and have, in fact, by doing that, precipitated a rebirth of our waterfront through things like the Clean Water Act.

Let me briefly give the context for the subsequent testimony in terms of this issue.

The City of Philadelphia developed, in fact, from its waterfront, as Senator Specter ably pointed out. In those early years, our waterfront was almost entirely devoted to maritime use.

What has happened over the last decades has been a dramatic shift in the nature of maritime operations worldwide, and Philadelphia has had to respond to that. What has occurred is that we have found that finger piers, as we all recall them, have become obsolete with regard to their effectiveness on the maritime side, and we have had to develop--which we have in Philadelphia—new container pier operations and specialized pier operations for things like fruit and roll-on/roll-off types of cargo.

We believe, as Senator Heinz indicated, that the port is a critical piece of the city's total economic activity. The Philadelphia port provides an opportunity for us to access markets internationally, and we are committed to the continued maintenance and growth of our port and maritime activity in that regard and have been working very diligently over the last year in particular to try to give strength to that port operation and maintain it and see it succeed.

The result has been, however, that we are faced with a central waterfront that has effectively become obsolete with regard to port related activity. The study that was done earlier to develop a central waterfront plan in fact looked at that and to the question, for example, of public purpose, the concept that an area is blighted and is, therefore, no longer producing benefit and, therefore, needs to be redeveloped. I think that is a fairly standard public purpose that we all have used before.

Therefore, we developed a central waterfront plan that provided a mechanism for an orderly, thoughtful growth along our central waterfront that we watch very diligently. We want to make sure that the growth occurs, in fact, in the public interest.

We see that interest served in a variety of ways—the rebirth of our central waterfront from marinas that have begun to provide incredibly increased recreational use of our river that did not exist and from the standpoint of providing for public access to the waterfront. The public clearly cannot now today on these piers walk to the edge and experience the phenomenon of a waterfront, but we mandate in these developments that public access be provide to the water's edge. So, in fact, we are providing something the public does not have today.

Obviously, from the city's perspective, it is the public purpose of jobs and tax ratables, housing and new development that is provided by having these piers from now their obsolete state into substantial new development. We have seen within the last few years that our plan which was just that when it was first developed has now become a reality, and the interest in developing along our waterfront is substantial.

It has become one of the highlights in terms of the rebirth of Philadelphia as one of the major northeastern cities in the United States, and we believe that there is compelling public interest served by the removal of this navigational servitude in order to continue that development which has begun in that area where it was removed in 1972 and we believe can blossom even more significantly if removed in the areas under discussion today.

With that, I think I will observe the guidance of the Chair and ask Mr. LaRue to speak from the port's perspective.

Senator STAFFORD. Mr. LaRue, we would be glad to hear from you now.

STATEMENT OF JOHN P. LaRUE, PRESIDENT, PHILADELPHIA PORT CORP.

Mr. LARUE. Thank you, Mr. Chairman. Good morning, Senator Specter.

I am John LaRue, and I am President of the Philadelphia Port Corporation. I am here for the Port Corporation to express our support for the legislation that would remove navigational servitude from certain areas of the central waterfront.

Just as background, the Port Corporation is a quasi-governmental agency that is composed and is chartered by the City of Philadelphia, the Commonwealth of Pennsylvania, and the Chamber of Commerce. Our purposes as listed in our charter include the promotion of waterborne commerce and the maintenance and modernization of the port's cargo handling facilities. We own many modern cargo facilities that are on the southern part of the extreme bottom of the large map on the right where we have container facilities and, as Bill Hankowsky pointed out, facilities for handling fruit, paper, import and export of automobiles and other commodities like cocoa beans.

We also own or lease from the city many older facilities that are no longer viable for cargo handling. To enable us to deal with these types of facilities, in 1986, our charter was amended to allow us to lease those facilities that are no longer essential for cargo to lease those for commercial, industrial, residential, or recreational use.

Two of the projects that are here today, pier 53-south which is the extreme southern one in yellow labeled Liberty Landing and pier 24-north which is in the middle of the group are two of the facilities that are under lease from the City of Philadelphia to the Philadelphia Port Corporation. The other facilities that are listed there are privately owned.

As Bill Hankowsky and Senator Specter mentioned, the changes in the last three decades in the shipping industry have brought about why we are here today, the facilities that we are dealing with are no longer capable of handling waterborne commerce.

Senator STAFFORD. Mr. LaRue, where are your roll-on/roll-off facilities now? Where do you handle the traffic that you did handle on these piers?

Mr. LARUE. The maritime traffic—there are actually additional facilities north of here, but right here at the bottom end is 115 acres for container and a multi-use facility. It has a roll-on/roll-off berth. It has a steel berth. It has sheds that handle cocoa beans. It has three container cranes. Two cranes can lift 50 tons and one is a heavy lift crane that can lift 375 tons.

So, it is a modern container facility. North of that we have just built an automobile facility for handling both import and export of automobiles, because American manufacturers like Chrysler now are starting to export automobiles.

We have rehabilitated several of the older piers here that are still viable for cargo in that they are large enough and they have the back-up infrastructure space for storage, these handle fruit, and paper. We import roughly 600,000 tons of paper every year from Finland and Scandinavia, and we are the principal port in the United States for that type of cargo.

So, it is centered in this area with another facility up north at what we call the Tioga area.

Senator STAFFORD. Thank you very much.

Mr. LARUE. As a result of what I have just explained, all of the cargo related activity has moved from the central waterfront district to the north and the south.

I should say that the Port Corporation has played and continues to play an active role in determining the reuse of these piers in the central waterfront district. Since we have leases with those facilities, we are involved with the Philadelphia Industrial Development Corporation in the negotiations on those leases.

Perhaps as far as public interest goes, one of the most important parts of this whole reuse program is the fact that when these piers are reused, the revenues that are generated by those piers come back to the Port Corporation for our use in cargo related activities. So, the money that is generated by the two developments that I spoke of here and by several other developments that are in that central waterfront right now flow back to us as rental payments. We then turn around and use those to be able to modernize and reuse our existing facilities and to buy new capital equipment that is needed to handle containers and other types of activities.

I would just like to say that I believe the proposed projects will enhance our port through the increased revenues that I have mentioned, and they will in no way impede our ability to continue to develop our port as a cargo related and cargo central load center. The facilities that we are talking about are no longer usable in today's maritime business, and it makes sound public policy and economic sense to develop them for new uses.

Thank you.

Senator STAFFORD. Thank you.

Before we go to the next panel member, I have just one more question for my personal information. How deep drafted vessels can reach your port facilities.

Mr. LARUE. Forty feet.

Senator STAFFORD. Thank you.

Now, Mr. Schelter, we would be glad to hear from you.

STATEMENT OF G. CRAIG SCHELTER, EXECUTIVE VICE PRESIDENT, PHILADELPHIA INDUSTRIAL DEVELOPMENT CORP.

Mr. SCHELTER. Mr. Chairman, Senator Specter, my name is Craig Schelter. I am Executive Vice President of the Philadelphia Industrial Development Corporation.

We are a non-profit, quasi-public economic development corporation that was created by the city in 1958 by the Chamber of Commerce and the City of Philadelphia. Since that time, we have financed over $2.5 billion worth of projects in the City of Philadelphia. We have done some 2,500 business transactions. In recent years, we have come to manage major economic development projects for the City of Philadelphia, including the international airport, the Philadelphia Health Center, and, in recent years, a major effort on the Philadelphia Port.

We have a contractual relationship to provide these services to the Port Corporation and to the Penn's Landing Corporation, the two quasi-public agencies that are involved in implementing this project.

Prior to that time, I was with the City Planning Commission and served as its executive director when the waterfront plan was developed from 1978 to 1973.

I would like to stress that that plan was one that the city undertook so that it would have a comprehensive and balanced development along the waterfront. It was a nine-volume study that was done over five years. It included analysis of port facilities, waterfront industry, river resources, water quality, district plans, and a river walk.

I would like to stress the river walk, and I would be happy to provide the committee with a copy. This was the major public benefit that we saw in the central waterfront, and that was to create a park-like boulevard and park setting along the entire waterfront that would provide access.

If I may, what I would like to do now is go to the easels and take you through what we believe is a very definite achievement for the city based on Congress' approval in 1972 and then show you some of our vision that would come about as a result of the proposed legislation that will be before you.

As Senator Specter so ably pointed out, the area in red is the area that is covered under the 1972 legislation. At that time, that embodied the city's entire vision of the central waterfront.

This aerial photograph today reflects a substantial portion of that. This central portion there called the Penn's Landing project—I would like to point out the elements of that plan which are in place.

This is an aerial photograph that was just taken six months ago, so it is very much up to date. It embodies a mixture of both public and private uses. The City of Philadelphia and the Commonwealth of Pennsylvania have spent approximately $50 million to create a public environment which includes a walkway along the river with major access via access ramps at Market Street and at Chestnut Street.

Very recently, the city committed $10 million to create a public plaza, a five-acre public plaza that will be open for all time, the Port of History Museum, and a boat basin.

Senator **Stafford**. Mr. Schelter, just to give us a perspective on the marina setup there, how large, if you can tell us, is that larger vessel that is moored in against the bulkhead.

Mr. **Schelter**. This large vessel is the battleship Olympia which is one of the scenic attractions. Immediately behind that is the submarine Lacuna, and then these are boats that vary in length between 16 and about 36 feet.

Senator **Stafford**. Thank you very much.

Mr. **Schelter**. In addition to that, you see numerous areas that are blacktop. Those are areas that are all designated in the future for private development. In fact, the first piece of private development, the Chart House Restaurant, has been developed on the south end here.

We will have under construction starting next April the first phase of the Penn's Landing project which will include about 186,000 square feet of retail commercial office space and a hotel, the idea here being to balance on the public side tax ratables generated by the private development and private development which can benefit from all this improved access.

Moving north from there and also covered by the 1972 legislation—this is the Ben Franklin Bridge here and this is I-95 you can see going by. The limit of the 1972 legislation is Callowhill Street.

Again, as you have seen just a moment ago, this marina—this was during construction of the final phase of that particular building. The marina is now located in this area. This pier has been totally rebuilt, and this facility has been turned into a unique marine merchandising center, the only one that we are aware of in the country right now that markets marine facilities right on the river front.

However, as part of this development, they have taken one decrepit pier and totally decked this pier over for parking purposes and wish to expand the same kind of development in the future. Immediately north of there is another pier. You can see the stubs of the pier. The proposal is to create a mixed use development on this pier which includes hotel, residential units, and this 20-story tower.

Senator STAFFORD. Mr. Schelter, with respect to that artist's concept, could you tell the committee how high the building might be at the end of the pier and also the three buildings in the background?

Mr. SCHELTER. The buildings at the end of the pier will be about 20 to 25 stories, and the buildings on the land side of the pier will be about 6 stories with 2 levels of underground parking forming the base of the building. I would also point out that there will be a public walkway that will go around the end of the pier, again to extend the public access.

Senator STAFFORD. How about the three buildings in the background?

Mr. SCHELTER. These two buildings in the background are proposed office structures that are owned by the same developers who have this pier. They, however, are on fast land and would not be affected by the legislation.

Senator STAFFORD. Do you know how high they are planned to be?

Mr. SCHELTER. Those buildings will vary between 30 and 35 or 40 stories.

Senator STAFFORD. Thank you very much.

Mr. SCHELTER. As you head further north on the river, what again you find are derelict industrial buildings. In this case, this is the former Jack Frost Sugar site. You can see the piers that, again, are rotted out. The decking is all but removed.

This, again, is an artist's rendering of what is proposed on this site. Again here an element of that plan is the river walk which runs along the project which will be part of the development when it is completed.

I would like to stress that these river walks are not something which is just shown for convenience or something the developers then can avoid doing at a later time. They are written into lease agreements with the Port Corporation. They are also a condition of the City Planning Commission's approval when they considered the piers.

Finally, here on the southern end of the waterfront, again you can see burned out piers in this location. You can see new development that is coming in along Delaware Avenue. This is I–95. This is the location of the new Coast Guard facility which has just recently been completed in Philadelphia.

The proposal is to take these piers and, again, created a mixed use development that will have low-rise residential townhouses, a residential tower around a major new marina with a hotel, office, shopping, and parking facilities. Again, the public purpose here we see is not only the tax ratables generated by these projects but also the fact of the public access that is generated from Delaware Avenue down to the waterfront and the access around the boat basin which provides a major public activity which has not heretofore been in place.

I would like to stress the magnitude, if I might, of this investment. The congressional action of 1972 has already allowed $143 million in investment to take place. Based upon that action, we expect another $658 million to complete those areas of the 1972 legislation. What is before you today in these five projects represents $550 million in investment.

The public benefit of that turns out to be about $1.3 billion over 30 years in revenue to the State and local governments. That, basically, offsets the costs which the city has already incurred in creating the Penn's Landing site.

I think I would like to close and just stress the fact that we have also created here a major new image for the city, a place for celebration and where now we can realistically talk of the river linking Philadelphia and Camden. On the Camden side of the river, they will go under construction in October with a $40 million aquarium which is financed, and the mayor will shortly be announcing, along with Mayor Primas, the reinstitution of ferry service to New Jersey.

So, what we believe we have here is a waterfront resource that will be utilized for all the public to benefit and enjoy.

Thank you very much, and I would be happy to answer whatever questions you might have.

Senator **Stafford**. Thank you, Mr. Schelter.

Would it not be possible for the development to proceed except as to the marina and the facility could be built on the now abandoned piers without regard to what happens on the navigational servitude issue?

Mr. **Schelter**. No, sir, we believe it would not. The reason for that is that with projects of this magnitude and the kind of investment that is being talked about—and we are talking about approximately $50 million per pier—the title companies will not insure the title without the removal of the servitude. Without the title companies insuring the title, these projects will not be able to be financed.

Senator **Stafford**. And that is true even of the properties that do not come out into the water at all? Do I understand that correctly?

Mr. SCHELTER. Portions of these properties were filled earlier under a Corps permit. So, they are affected by the same condition. Yes, sir. That is the case of the northern most project, the riverside industrial center.

Senator STAFFORD. Could you tell me, Mr. Schelter, how many new housing units will be created if these developments occur?

Mr. SCHELTER. The City Planning Commission has projected that there could be as many as 6,000 new dwelling units on the central waterfront. That includes both land side and waterside development.

To date, the piers that have been developed have been approximately—specifically, the pier developed is 173 units. The second pier going underway is 96 units, and the piers that I spoke of in this Liberty Landing project are approximately 250 units.

So, it is a relatively low density development based upon the area of the pier.

Senator STAFFORD. Will the proposed marina have a capacity for recreational types of boats?

Mr. SCHELTER. Yes, they will.

Senator STAFFORD. Do you anticipate that the Philadelphia Industrial Development Corporation will be requesting other nonnavigability declarations in the foreseeable future?

Mr. SCHELTER. I would expect that probably for at least the next five or six years, the answer to that would be no. What we tried to do here was to present a balanced approach to the waterfront development. We are very cognizant that, as we move forward on the central waterfront, we also wanted to balance that on the south Delaware waterfront and the north Delaware waterfront with industrial uses that would create both blue collar jobs as well as the new restaurant and hotel jobs on the central waterfront.

So, we believe we have a balanced approach here. We have a full agenda. I would be delighted if the market were that strong that we could come back to you sooner, but I don't foresee it right now, sir.

Senator STAFFORD. All right, thank you. I am going to thank all of the panel members for myself and the committee members who aren't able to be here.

I am going to again say we do have some questions, but in the interests of time and for you to have an opportunity to reflect on what your answers might be, we will submit the additional questions in writing. We would urge your early response so that we can act expeditiously here.

Mr. SCHELTER. Senator, might the committee indulge me for one additional comment?

Senator STAFFORD. Yes, sir.

Mr. SCHELTER. I would like to comment on the issue of the environmental impact statement that occurred in 1972 since that issue was raised before. At that particular time, I was working at the Planning Commission but working with the Penn's Landing Corporation.

At that time, the environmental impact statement was done because when the servitude was removed, there would be no further permit review by the Corps of Engineers. So, a full EIS was done.

In essence, when the individual developers come forward on these piers, they are no longer filling in the river as was done with the Penn's Landing project. In essence, in order to respond to the Corps and to EPA with regard to fish life and with regard to river bottom life and water quality, they essentially have to do an environmental impact statement.

So, we believe that is adequately responded to when the developers come for their individual permits.

Senator **Stafford**. Thank you.

The Chair notes that Senator Pressler of South Dakota, a very valuable member of the committee, has arrived.

Senator, do you have any comment or any question at this point?

Senator **Pressler**. No, I don't. Thank you, Mr. Chairman.

Senator **Stafford**. Thank you, Senator.

The Chair would recognize Senator Specter for whatever questions he might wish to ask.

Senator **Specter**. The only question that I have, Mr. Chairman, is whether the recitation by Director of Commerce Hankowsky is satisfactory from Mr. Doyle's point of view.

Did you have a chance, Mr. Doyle, to hear Mr. Hankowsky state the formula for the reservation of powers to the Corps?

Mr. **Doyle**. No, Senator, I didn't. I apologize.

Senator **Specter**. Well, I think it would be useful if Mr. Hankowsky would repeat that. It sounded to me as if he had a full reservation. That was the one issue that I wanted to see if there was any problem from your point of view, Mr. Doyle.

Mr. Hankowsky, could you just repeat that part of your testimony?

Mr. **Hankowsky**. Surely, Senator.

The proposed language that we would ask the committee to consider is as follows:

> The portions of the Delaware River in Philadelphia County, Commonwealth of Pennsylvania that are particularly described in the metes and bounds below are hereby declared to be non-navigable waters of the United States for purposes of the navigational servitude. This does not remove or affect the Department of the Army's regulatory authorities under section 404 of the Clean Water Act of 1977 or section 10 of the Rivers and Harbors Act of 1899.

Senator **Stafford**. Before Mr. Doyle answers, I think the Chair would intercede to say that if he prefers to answer this promptly but in writing rather than to do so here on the spur of the moment, I think he should have that opportunity.

With that, Mr. Doyle, if you want to go ahead and answer it, go ahead.

Mr. **Doyle**. Thank you, Senator. Let me take this opportunity to give you an initial reaction and then a further response in writing.

There is a hierarchy, in the preferences of the Department of the Army on how to approach declarations of nonnavigability. Clearly, the reservation of regulatory authority contained in the second sentence of the proposed language is a welcome modification to the declaration contained in the first sentence. We would prefer beyond that, however, to have the declaration made contingent on the prior issuance of the permits. And I would be glad to try to develop that kind of language after the hearing.

Senator **Specter**. Well, I would appreciate it if we could move forward on that. I do not know the ins and outs, but I have a concern that if there is some language of the conditional action of the Congress contingent on future action of the Corps that that might pose some technicality that the title companies would be concerned with.

So, I would echo what the chairman has said, and that is to move promptly both by way of responses.

Mr. Hankowsky?

Mr. **Hankowsky**. I realize you want to keep moving, but I have just a brief response to that, and perhaps we could follow up in writing.

I think our position is fairly clear. We absolutely respect the Corps' regulatory powers and want to preserve those and think they are essential. As was indicated earlier, one of the situations is that title companies currently don't look at those regulatory powers as exceptions because, in fact, it is the due diligence of the private sector to procure them.

In effect, all we would have done is substituted those permits for the servitude question since, again, they really wouldn't have extinguished them until they got the permits. Again, we have put the clarity of the title situation at the far back end of the development process instead of at the front end.

We think we can both solve the practical development problem of getting financing and beginning to do development—some of these projects literally cannot draw down financing today to even do the work necessary to ensure that the kind of information the permits need——

Senator **Specter**. Are you saying that you can satisfy Mr. Doyle and the title companies?

Mr. **Hankowsky**. Not with the condition. We think our language is in fact the only way to get the dollars available to satisfy the Corps. We don't think it should be conditional that the servitude is removed only after the permits. We would prefer to do it with the language that we have entered into the record.

Senator **Specter**. Well, aside from the issue of preference, the question is, what can be worked out in a practical context? My own suggestion would be that the parties sit down and try to work it out, and if you can't work it out, if you come back to me, I will work with you, and I will take it up with Senator Stafford and the committee.

Mr. **Hankowsky**. We appreciate the offer of assistance.

Senator **Stafford**. Is there anything further you wish to say, gentlemen, before we conclude?

Mr. **Hankowsky**. No, thank you.

Mr. **Schelter**. Thank you for the opportunity.

Senator **Stafford**. We thank all of you.

The committee stands adjourned.

[Whereupon, at 11:19 a.m., the committee recessed, to reconvene subject to the call of the Chair.]

[Statements submitted for the record and responses to additional questions follow:]

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY OF THE ARMY
(CIVIL WORKS)

COMPLETE STATEMENT

OF

MR. JOHN S. DOYLE, JR.
PRINCIPAL DEPUTY ASSISTANT SECRETARY OF THE ARMY
(CIVIL WORKS)

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

UNITED STATES SENATE

ON

NAVIGATION SERVITUDE, DECLARATIONS OF NONNAVIGABILITY

AND ON

A PROPOSED DECLARATION OF NONNAVIGABILITY ON THE

DELAWARE RIVER AT PHILADELPHIA, PENNSYLVANIA

JULY 29, 1988

**NOT TO BE RELEASED UNTIL APPROVED BY THE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE**

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COMPLETE STATEMENT
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NONNAVIGABILITY, AND ON A PROPOSED DECLARATION OF NONNAVIGABILITY
ON THE DELAWARE RIVER AT PHILADELPHIA, PENNSYLVANIA

July 29, 1988

Mr. Chairman and members of the subcommittee, I am John S. Doyle, Jr., Principal Deputy Assistant Secretary of the Army for Civil Works. I am pleased to appear before you today to testify on the navigation servitude and statutory declarations of nonnavigability, and the proposed declaration of nonnavigability for the Delaware River at Philadelphia.

The Navigation Servitude

The term "navigation servitude" describes the sovereign power of the Federal Government in the "navigable waters of the United States." It amounts to the right to take, damage or destroy private property, without payment of compensation, when the Federal Government is acting in the interest of navigation and the property is located within the navigable waters of the United States. The term "navigable waters of the United States" traditionally is defined as all waters subject to the ebb and flow of the tide, and/or non-tidal waters which are presently used, or have been used in the past, or could with reasonable improvements be used in the future, to transport interstate or foreign commerce.

The navigation servitude arises under the Commerce Clause of the Constitution, which provides that: "The Congress shall have power to regulate commerce with foreign nations and among the several states, and with Indian tribes." In 1824, the Supreme Court held in the case of Gibbons v. Ogden, 22 U.S. 1, that the power to regulate commerce necessarily included power over navigation. Since the Gibbons case, a number of Supreme Court and lower court decisions have refined the rule to its present state.

Property that is subject to the navigation servitude may be used by its owner for any lawful purpose. At any time, however, the United States may exercise its power under the navigation servitude to take property in the interest of navigation without paying compensation, or to compel the property owner to remove any obstructions to navigation on the property at no cost to the United States.

In furtherance of its responsibilities under the navigation servitude, the Department of the Army administers three important regulatory programs which cover various activities in the navigable waters. These programs are reflective of the sovereign's dominant powers in the "navigable waters of the United States" and derive from statutes set forth in Sections 9 and 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 401, 403; and Section 404 of the Federal Water Pollution Control Act, also known as the Clean Water Act, 33 U.S.C. 1344. Sections 9 and 10 grant authority and responsibility to the Secretary of the Army to regulate all work or structures in or affecting the traditionally "navigable waters of the United States." Section 404 regulates proposed discharges of dredged or fill material in the traditionally navigable waters and in other waters of the United States.

Declarations of Nonnavigability

The navigation servitude and Sections 9 and 10 of the Rivers and Harbors Appropriation Act of 1899 apply only to the "navigable waters of the United States." Thus, if an area once considered navigable is statutorily declared nonnavigable, the "navigation servitude" and Sections 9 and 10 no longer apply unless regulatory authority is expressly reserved. It appears that a congressional declaration of nonnavigability would not extinguish the Clean Water Act regulatory authority since the Clean Water Act applies to all waters of the United States in addition to the traditionally navigable waters.

Declarations of nonnavigability are sometimes seen as a prerequisite to development. The parties who propose to develop a particular site within the "navigable waters of the United States" are confronted with a "cloud" on the title to the property, because of the "navigation servitude." The developers, or, more properly, the finance and title insurance companies with which the developers wish to contract, occasionally worry that the United States retains the right to one day require removal of the developments at non-federal expense. This likelihood is apparently great enough, in some cases, to effectively prevent the developers from obtaining title insurance or financing for their projects.

The declaration of nonnavigability extinguishes the dominant rights of the United States to act in the interest of navigation on property subject to the navigation servitude. The pronouncement generally satisfies the concerns of the title insurance and finance companies with respect to the Federal Government's superior property rights.

Our position on Declarations of Nonnavigability

Typically, the Department of the Army is not asked whether it supports a proposed declaration of nonnavigability, but rather, whether it has any objection to it. The Army will not normally raise an objection if four criteria are met: 1) the proposed development does not obstruct the current or anticipated navigation channel or otherwise interfere with current or projected needs of navigation; 2) the declaration is limited to the property proposed for development and only those portions of the property which have been or will be converted to fast lands through lawful means; 3) the declaration of nonnavigability is made contingent upon the granting of all necessary Federal permits; and 4) the proposed development will serve a useful public purpose.

Determining whether the proposed project obstructs the existing navigation channels is relatively straightforward. The Department of the Army makes a study of the existing navigation channel and determines whether the proposed development lies within the limits of that channel or otherwise interferes with navigation. Anticipating the future needs of navigation is more difficult and involves subjective judgements about the dimensions and location of navigation channels, turning basins, or other needs of navigation twenty, fifty or one hundred years from now. Nontheless, it is possible to make informal judgements about what areas will be needed for future navigation. When it is determined that an area will not be required for future navigation, the first criterion is satisfied.

Because it is difficult to predict with certainty future navigation needs, and because the navigable waters of the United States are a public good which Congress and the Executive Branch hold in trust for the people, it is important to limit the declaration of nonnavigability to the minimum amount of property that is required to effectuate the purpose of Congress. To ensure that declarations of nonnavigability are not overbroad, the Department of the Army generally insists that the declaration of nonnavigability be confined to the property that is proposed for development and to only those portions of the property which have been or will be converted to fast lands through lawful means.

The Department of the Army believes that all declarations of nonnavigability must be made contingent upon a requirement to seek and receive all necessary Federal permits. The absence of such a contingency would create a gaping loophole in the Federal Government's regulatory responsibilities and provide a convenient escape hatch for developers from compliance with statutes which impose reasonable regulatory requirements on landowners in the interest of navigation or the environment. A developer armed with an unqualified declaration of nonnavigability would have a blank check to discharge pollutants or to fill the area in an irresponsible manner without regard for otherwise applicable environmental statutes and related regulations. Retaining the contingency is thus necessary to ensure that these important public policies are served. In this regard, interested parties should not consider legislative declarations of nonnavigability as guarantees that proposed projects will be permitted, since Federal permits may be denied or conditioned so as to restrict development which would be contrary to the public interest or otherwise fail to meet a statutory or regulatory requirement for permitting.

The final consideration, whether the declaration serves a useful public purpose, is harder to determine. In some cases, the public purpose is apparent, as when a public entity, such as a town or city, seeks the declaration in order to develop a public facility such as a park. In other cases, the public purpose may not be so apparent. For example, a private party may wish to develop a site for profit, but the development itself may satisfy public needs or incidently serve a public purpose. If the proposed development serves a clear public purpose, the Department of the Army will not normally object to the declaration of nonnavigability, provided the other criteria discussed above are met. If the purpose of the development is narrower, or strictly private, we are more likely to object, since the navigable waters of the United States are a public good, held in trust by the Federal Government for the benefit of all Americans. Extinguishing the public's rights in such waters should only be done judiciously and with the welfare of the public in mind.

The Proposed Declaration of Nonnavigability on the Delaware River at Philadelphia

The proposed declaration of nonnavigability on the Delaware River would cover four separate sites on the Philadelphia waterfront. Two of these sites are directly adjacent to the north and south ends of a large area of the central Philadelphia riverfront already declared nonnavigable by Public Law 92-605, approved on October 31, 1972. A third site is located approximately 1500 feet north of the more northerly of the first two, and the fourth site is considerably further to the north, away from the central riverfront.

Five different developments are contemplated on these four sites. From south to north, they are:

1. Liberty Landing (Piers 53, 55, 56 and 57 South)

Liberty Landing Associates, a private development concern, proposes to construct a mixed-use project on several piers located south of Washington Avenue on the Delaware River.

Liberty Landing will consist of a major hotel, retail space, office space, various types of residential units, a yacht club and a marina. The project will also include on-site parking and new access roads. The total project area, which includes adjacent fastland, comprises about twenty-four acres. Pier 53 is owned by the Philadelphia Port Corporation and will be leased to the private developer. Piers 55, 56 and 57 are owned by the Sheet Metal Workers Local 19, a joint venture partner of Liberty Landing Associates. The existing piers have deteriorated. Pier 53 is merely the remnant of an old pier, consisting of concrete and work bulkheading extending to the pierhead line; Pier 56 was damaged by fire and does not reach the pierhead line; and Pier 57 is a concrete and wood bulkhead with concrete paving overgrown with weeds.

2. Marine Trade Center (Pier 24 North)

Pier 24 North, located north of Callowhill Street, is the northernmost pier that is part of a private development known as the Marine Trade Center, which also includes Piers 12, 13, 15, 17 and 19. The other piers in the project are located on property covered by the 1972 declaration of nonnavigability. The Marine Trade Center, which incorporates the piers and the water area between them, consists of a marina, storage facilities, a restaurant, a yacht club and a store. These facilities are currently in operation. Pier 24 is a formerly burned-out pier that has been reconstructed with a parking deck for 400 cars. The parking area serves the restaurant on Pier 19 and adjacent waterfront facilities. The north side of the pier also serves charter and specialty boats which dock there. Pier 24 is owned by the City of Philadelphia, leased to the Port Corporation and, in turn, subleased to the private developer, Marine Trade Center Associates.

3. Marina Towers/World Trade Center (Pier 25 North)

Pier 25 North is part of a 5.25 acre site located at Callowhill Street and is owned by another private developer, Silver Harting and Company. The pier itself is about one acre and is in deteriorated condition. The private developer proposes to construct a major mixed-use project, consisting of three office buildings that would include retail space and ancillary on-site parking.

4. National Sugar Company Site (Piers 41 to 50 North)

The national Sugar Company Site is located between Poplar and Shackamanon Streets and consists of Piers 41 to 50 North. The site contains industrial facilities and vacant land. The private developer proposes to construct a mixed-use project consisting of residential units, commercial space, a marina, and on-site parking.

5. Rivercenter (Cramp Shipyard)

This most northerly site, away from the central riverfront area, consists of 43 acres of vacant land located near Richmond and Dyott Streets. It is known as Riverside Industrial Park, and is the site of the former Craep Shipyard. Rivercenter, Incorporated, the private developer of the project, proposes to develop the site for light industrial and manufacturing use to include a showroom, distribution and office space, and other uses consistent with its zoning.

Now that the sites have been described for the record, I will explain the Department of the Army's position in the context of the criteria on the proposed declarations of nonnavigability based on the general criteria I described earlier.

As proposed these areas are in some cases very near a heavily used navigation channel, but within the pierhead line as it currently exists. This causes me some concern, yet based upon the information presented to date, we would not expect these proposed developments to interfere with current navigation nor are they expected to interfere with navigation in the near future.

As you know, these proposed projects have not been evaluated for Department of Army permits, and, therefore, it is premature to express any judgement in that regard. If the Congress proceeds with a determination of nonnavigability, we urge that such a determination be made contingent upon the issuance of Federal permits that otherwise would be required under the Rivers and Harbors Appropriation Act and the Clean Water Act.

At this juncture it appears that the proposed developments are primarily private developments, or, at most, private developments which may advance some indirect or incidental public purpose. Without a clear showing of public purpose, the Department of the Army objects to the proposed declaration of nonnavigability based on what is known about the developments at this time.

In conclusion, as a general rule we believe it is far better to allow the Federal permit processes to be completed before decisions are made concerning nonnavigability. However, we understand the prerogatives of Congress on this matter and urge that in the event that a determination of nonnavigability is made prior to the issuance of required permits, that the determination be made contingent upon receiving such permits and that the determination apply only to those areas which have been or will be filled by some lawful means.

Mr. Chairman, this concludes my statement. I will be happy to answer any questions.

QUESTIONS FROM SENATOR STAFFORD
NAVIGATIONAL SERVITUDE HEARING

1. Does navigation servitude have implications with respect to public access to property? If so, please explain.

Yes, areas impressed with the Federal navigation servitude are open for navigation by the general public on equal terms, subject to reasonable government regulation. When an area is statutorily declared to be nonnavigable, this right of access for navigation ceases.

2. Has the Corps of Engineers ever exercised the Federal Government's rights under navigation servitude and required the removal of private properties? Has navigation servitude ever been exercised in such a way as to require the removal of fill or improvements which were approved by the Corps under Section 10? If so, please provide the specifics of each instance. Have any of these "takings" been challenged in court? If so, please summarize and provide a copy of the court's findings.

There have been instances when the Federal Government has required the removal or modification of structures or fill in the navigable waters that have been illegally placed without required Federal approval. These actions have at times been addressed by the courts and in large measure have been sustained. There is also at least one instance when the Federal Government has required the removal or modification of improvements in the navigable waters subsequent to their approval by the Army under Section 10. That circumstance was addressed by the courts in the Stoeco Homes decision, which is attached.

3. Please provide your recommended model language for a Congressional declaration of non-navigability. If your proposed language conditions the lifting of navigation servitude on the issuance of permits, please explain why this is important.

The recommended language is as follows:

Section ____ : Declaration of Nonnavigability for ______________

(a) Area to be declared nonnavigable - public interest

If the Secretary of the Army finds that a proposed project in __________ __________, __________ to be undertaken within the boundaries described below, is in the public interest, after consultation with local and regional public officials, to include local and regional public planning organizations, then, subject to subsections (b) and (c) of this section, those portions of the ________________ River/Stream/Bay/Lake, bounded and described as follows, are declared to be non-navigable waters of the United States:

____

____

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____.

(b). Limits on applicability - regulatory requirements

This declaration shall apply only to those parts of the area(s) described in subsection (a) of this section which are bulkheaded and filled or otherwise occupied by permanent structures. Said bulkheading, filling, and construction shall take place only if permits therefore are granted by the Department of the Army pursuant to all applicable Federal statutes and regulations, including, but not necessarily limited to , Sections 9 and 10 of the Rivers and Harbors Appropriation Act of 1899, as amended, 33 U.S.C. 401,403; Section 404 of the Federal Water Pollution Control Act, known as the Clean Water Act, 33 U.S.C. 1344; and the National Environmental Policy Act of 1969, as amended, 42 U.S.C. 4321, et. seq.

(c) Effective date

This declaration shall not take effect, with respect to any part of the area(s) described in subsection (a) of this section, until the structures or work described in subsection (b) of this section have been completed in accordance with the requirements set out in subsection (b) of this section and the terms and conditions of all applicable permits.

The proposed language above is conditioned upon the satisfaction of all applicable Federal statutes and regulations that would apply, absent the declaration of non-navigability, to include obtaining of all applicable fed-

federal permits. This is important because the policies and protections advanced by these various statutes and regulations, from environmental protection to assurance of sound construction, are quite important and must be served. Failure to condition a declaration in this manner would inappropriately restrict the Federal Government's ability to protect the navigable waters.

4. Could a declaration of non-navigability prejudice Corps deliberations pursuant to the 404(b)(1) guidelines. Please explain. If so, could this problem be addressed by modifications to our proposed model language?

The 404(b)(1) Guidelines, at 40 C.F.R. Section 230.10(a), in general prevent the granting of a 404 permit for any proposed project if there exists a less environmentally damaging practicable alternative. For non-water dependent activities, the guidelines create a rebuttable presumption that upland alternatives are available and less damaging on the aquatic environment. The effect is to discourage non-water dependent fills. Thus, if Congress implicitly expresses support for the filling and development of an area by enacting a non-navigability declaration, that implication would not be consistent with the 404 (b) (1) Guidelines. However, absent a clear Congressional declaration of intent that an area be filled, the Corps would evaluate the 404 permit application like any other permit application.

5. How many declarations of non-navigability have been granted by Congress? Please provide a chronological list of these. Have any of these declarations resulted in problems for the Corps of Engineers navigation programs or in some way resulted in navigation problems? If so, please explain. Do you anticipate that any of these declarations may at some time in the future cause problems? If so, please explain.

Seventy three declarations of non-navigability have been enacted by Congress and included in the U.S. Code. It is possible that other declarations have been enacted and have not been codified.

In chronological order, the seventy three codified declarations of non-navigability are as follows:

Declaration	Year	Citation (33 USC unless noted)
Iowa River, IA	1894	31
Cuivre River, MO	1900	29
Mississippi River, LaCrosse, WI	1901	35
Osage River, MO	1904	41
Grand River, MO	1905	30
Sturgeon Bay, IL	1907	44
Big Tarkio River, MO	1910	24
Nodaway River, MO	1910	37
One Hundred and Two River, MO	1910	40
Calumet River, IL	1913	26a
Mill Slough, OR	1913	34
Calumet River, IL	1915	26
Swan Creek, Toledo, OH	1915	45
Cache River, AR	1916	25
Crum River, Delaware Bay	1916	28
Oklawaha River, FL	1916	38
Bayou Meto, AR	1917	22
Mosquito Creek, SC	1917	36
Ollala Slough, OR	1917	39
Saint Mary's River, OH and IN	1917	43
Little River, AR	1919	33
Bayou Cocodire, LA	1921	21
Platte River, MO	1921	42
Lake George, MS	1922	32
Tchula Lake, MS	1922	46
Bear Creek, MS	1923	23
Chicago River at Chicago, IL	1923	27
Eagle Lake, LA & MS	1926	47
Nuxubee River, MS	1934	48
Chicago River, W. Fork, S. Branch	1935	27a
East River, WI	1935	29a
Bayou Saint John, New Orleans, LA	1936	49
Bayou Savage (or Chantilly), New Orleans, LA	1937	55
Benton Harbor Canal, MI	1937	53
Burr Creek, Bridgeport, CT	1937	54

Declaration	Year	Citation
Calumet River, Chicago, IL	1937	26b
Park River, CT	1937	52
Scajaquada Creek, NY	1937	51
Turtle Bay & Turtle Bayou, TX	1937	50
Denduskeag Stream, ME	1947	59p
Acushnet River, N. Bedford Harbor, MA	1955	58
Fort Point Channel & S. Bay, MA	1955	56
Pike Creek, WI	1955	57
West River, West Haven, CT	1955	59
Back Cove, Portland, ME	1957	59a
Bayous Terrebonne & LeCarpe, LA	1959	59b
Chicago River, W. Arm S. Fork, S. Branch	1959	27b
Benton Harbor Canal, MI	1963	53a
East River, NY	1965	59c
River Raisin, MI	1965	59d
Bayou LaFourche, LA	1967	59a
Boston Inn, Harbor & Ft. Pt. Channel, MA	1968	59f
East and Hudson Rivers, NY	1968	59c-1
Northern Embarcadero, San Francisco, CA	1968	59h
Patapsco River, MD	1968	59i
Steele and Washington Bayous, and Lake Washington, MS	1968	59g
Delaware River, Philadelphia, PA	1972	59j
East River, NY	1974	59c-2
Wicomico River, MD	1974	59k
Hackensack River, NJ	1976	59n
Lake Oswego, OR; Lake Coeur d'Alene, ID and Lake George, NY	1976	59m
Erie Basin, Buffalo Harbor, NY	1980	59q
Trent River, NC	1980	59r
Green River, WA	1981	59s
Burnham Canal, Milwaukee, WI	1983	59t
Lake Winnisquam, Lake Winnipesaukee, Merrimack River, NH	1983	43 USC 4301
Bayou Lafourche, LA	1986	59a-1
Caven Point, NJ	1986	59n-1
Lawyer's Ditch, NJ	1986	59u
Middle River, MD	1986	59v

Norton Basin and Jamaica Bay, NY	1986	59w
Union Canal, Buffalo, NY	1987	59q-1

I am not aware that any of the declarations have resulted in any significant Federal regulatory problems or other navigation problems. However, future problems could arise if any of the declared areas are otherwise serving to impair then-existing requirements of navigation or then-existing proposals to improve navigation.

6. In the event of a Congressional declaration of non-navigability, would the value of the property so undergo a significant increase in value? If so, why? Would there be any way for the Federal government to recover all or part of the increase in land value brought about by a non-navigability declaration? Would you recommend such a proposal?

Although individual cases would vary, we anticipate that declarations of non-navigability would cause increases in property values. This is because the navigation servitude is sometimes seen as a "cloud" on the title of a piece of property, an impediment to clear title, which hinders or prevents title insurance and thus, financing for development of the property in question. Thus, a declaration of nonnavigability, by relinquishing the navigation servitude, removes what is perceived as a major obstacle to development. The removal of such an obstacle could have value, which might be reflected in an increase in the price the property can command. There is no currently existing authority of which we are aware that would enable the United States to recover any increase in land value resulting from a statutory declaration of non-navigability. Should the Government be authorized by Congress to recover such an increase in value, any such recovery would have to be based on approved real estate appraisals, using the "before and after" approach, prepared for each ownership affected by the congressional declaration. Again, removing the burden imposed by the servitude may or may not result in an increase in fair market value. Such determinations can only be made on a case-by-case basis.

7. What is there to prevent a developer who has obtained a declaration of non-navigability (and any associated increase in land values) from changing plans and selling the land so declared for a profit? Has this ever happened before? If so, please explain. Please explain how this might be prevented.

Once a developer has an unconditional declaration of non-navigability in hand, there is nothing of which we are aware which would prevent the developer from reaping a windfall profit by selling the property. We do not know of any such sales, but it is entirely possible that they have occurred without our knowledge. Making the effective date of declarations of non-navigability contingent upon the completion of construction in accordance with the terms and conditions of applicable permits removes this opportunity for speculation.

8. In the context of your testimony and answers to the above questions, please comment on the declaration of non-navigability for the Gravesend Bay area in New York, which is contained in S. 2100 as passed by the Senate. Would you recommend modifying the language of this provision?

As passed by the Senate, the Gravesend Bay declaration reads as follows:

> Sec. 222. The portions of Coney Island Creek and Gravesend Bay, New York, that are particularly described in the metes and bounds description below are hereby declared to be nonnavigable waters of the United States for purposes of the navigation servitude.

We would recommend modifying the Gravesend Bay declaration to conform to the proposed model language set out above. We are troubled by this proposed legislation because it is an absolute declaration of non-navigability and does not contain language which addresses the public interest concerns which we have previously discussed.

9. Are there other instances, either on the Delaware River or elsewhere, where significant waterfront development has gone forward without the benefit of a Congressional declaration of non-navigability? If possible, please provide several specific examples. Does there seem to be any pattern, either by geography, type of project, types of financing, or other considerations in determining whether development has gone forward without a Congressional declaration of non-navigability?

Over the last 93 years, there have been 73 declarations of non-navigability that we have been able to identify. During this same period, the Army Corps of Engineers has, by rough estimate, issued 250,000 permits for activities along the navigable waters of the United States. Obviously, the vast majority of these permitted activities were undertaken without the benefit of a Congressional declaration. Therefore, if one were to look for a pattern, it would be more appropriate to look for one among the declarations. The most obvious pattern is geographical. Five states - New York, Louisiana, Mississippi, Illinois, and Missouri - account for 46 percent of the non-navigability declarations. New York leads these states with the most declarations (eight) and has the most recent declarations (one each in 1986 and 1987). Since these declarations are spread over such an extended period of time, the only records readily available for review are the declarations themselves. Review of these declarations does not seem to provide a pattern. Only a few provide clues as to the types of projects involved. In those cases, the creation of new channels and filling activities are the most often mentioned. It should be noted, however, that in a sampling of district permits, we were unable in recent years to find an analogous situation to the Delaware River at Philadelphia case, where a major development is in such close proximity to a main channel.

10. Do you believe that Federal navigation servitude is a significant impediment to water front development in the U.S.? Please explain.

Virtually all development along the navigable waters of the United States has taken place without the benefit of declarations of non-navigability. Proposed development for which such declarations have been made probably accounts for a very small percentage of the total amount of development that takes place along navigable waterbodies. Recognizing this fact, we do not believe that Federal navigation servitude is a significant impediment to water front development, since so much has occurred without declarations of non-navigability.

11. Please describe the present and potential Federal navigation projects in the vicinity of the area proposed to be declared non-navigable. Are there currently any Corps studies with respect to channel improvements in this area? Please describe the possible recommendations of these studies. Are these studies and their anticipated recommendations premised on anticipated increases in traffic in the Philadelphia area? If so, please elaborate.

One study is currently underway in the Delaware River area near Philadelphia. The interim feasiblity report submitted in FY 85 for the

Delaware River Comprehensive Navigation Study, NJ, PA, & DE, (Delaware River from Philadelphia to Wilmington) recommended deepening of the lower Schuylkill River, Philadelphia, PA, from 33 feet to 40 feet; the Beckett Street Terminal, Camden, NJ, from 37 feet to 40 feet; and further consideration of deepening Wilmington Harbor, DE from 35 feet to 38 feet under the special continuing authorities program. This project is included for authorization in S. 2100. These studies assume the following annual equivalent tonnages from the initial 1990 base year to 2040 (all figures are given in 1,000 short tons):

Schuylkill River:	Grain - 3,450
	Gasoline, fuel oils, and jet fuel - 2,109 tons
	Catalytic charge stock - 193
	Lube oil - 632
Beckett Street:	Coal - 350,000
	Scrap metal - 343,459
	Titanium slag - 89,636
	Iron ore - 92,549
	Gypsum rock - 96,094
	Lumber - 102,833

Total tonnages would increase from the present 17.1 million tons per year to 17.2 million tons per year with the deeper channel. Total number of movements would increase from 915 per year at present to 925 per year with the deeper channel.

No other projects are anticipated.

12. Please describe the type and volume of commercial waterborne traffic which currently passes in the vicinity of the areas which are proposed to be declared to be non-navigable. What type of industries in the area support this traffic?

The existing Delaware River Navigation System includes six deep draft navigation projects serving the Ports of Philadelphia, PA; Camden, NJ; Trenton, NJ; and Wilmington, DE. These ports support annual vessel passages averaging 44,000 passages and tonnage averaging 114 million tons. The major commodities transported are crude oil and refined petroleum associated with the seven oil refineries located along the river and its tributaries. Other major commodities likely to benefit from improvement include iron ore; scrap; coal; grain; chemicals; limestone; motor vehicles; gypsum and other dry bulk shipments; lumber; and containerized general cargo. The system also serves naval vessels at the Philadelphia Naval Base.

13. Are there any advances in navigation technology or other changes such as anticipated increases in traffic which would require the exercise of navigation servitude on the Delaware River in the foreseeable future?

We are not aware of any advances in technology nor do we anticipate increases in traffic.

14. Would it be true to say that there is increasing non-industrial development (recreational marinas, retail, office buildings, residences, etc.) along waterways used for commercial navigation in the U.S.? If so, has this development proven to be compatible with existing or increasing levels of commercial navigation? Why or why not? If not, has this juxtaposition of different purposes resulted in serious conflicts? If so, please provide specific instances. What role, if any, has the Corps played with respect to the resolution of these conflicts?

We are not aware of an obvious increase in the rate of development along the navigable waters of the Unites States, with the possible exception of receational boating facilities.

Activities in navigable waters are subject to Corps regulatory review pursuant to Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act. The Corps permit program is designed to insure that development is compatible with the needs of navigation. Applications for permits are subject to public review and comment as well as a thorough review by the Corps and other Federal and State agencies. Concerns with individual development are normally raised during this review process. During this review process the Corps insures that these concerns are addressed and affords an opportunity to resolve them. This process is essential in protecting the welfare of the public.

Complaints from the private and commercial sectors concerning industrial development associated with water borne commerce are numerous when industrial facilities or operations are proposed for siting near private housing or commercial areas. These complaints include; safety concerns, such as those relating to the explosion potential associated with the handling of petroleum and chemical products; health concerns, such as those relating to potential chemical contamination of air and water and the generation of dust; and concerns relating to a full range of potential nuisances, such as the unpleasant look, odor, and sounds of a project. A specific example of how these concerns are resolved is the Islands Restaurant, a floating structure which the Corps Louisville District permitted on the Ohio River at Louisville, Kentucky. Towboat operators felt this facility would unacceptably impact the maneuvering room available in the downstream approach to McAlpine Lock and Dam. The district determined that, with certain project modifications, potential impacts on navigation were not unacceptable and permitted the restaurant facility, which was sited several hundred feet from the navigation channel.

15. In the early 1970's, the American Bar Association suggested a way for Congress to addess the problems which navigation servitude causes for developers without lifting navigation servitude itself. A copy of this proposal is attached. Please provide your comments on this proposal.

We would not support the ABA proposal at this time for a variety of reasons:

a. The first section of the proposed legislation would authorize the Department of the Army to grant, for structures only, permits which are revocable (as at present) or which are irrevocable either permanently or for a stated period of years. Such a proposal is unnecessary, because the Army has authority to grant either revocable or irrevocable permits.

b. The first section of the ABA proposal also would authorize the Army to decide, independantly of the Congress which permitted structure should be free of the no compensation rule of navigation servitude and of possible permit revocation. The Army does not seek nor does it want such authority. Extinguishment of the no compensation rule of navigation servitude is an extraordinary event which should only occur by Act of Congress. Moreover, as a general rule, the Army would not want to grant irrevocable permits, since an activity found not contrary to the public interest at one time may later become contrary to the public interest through changed circumstances, subsequent actions of the permittee, or because the needs of the public have changed. In addition, Army permits should be revocable to facilitate enforcement actions against permittees. When a permittee violates the conditions of his permit and threatens to harm the public interest thereby, the Army should have the right to suspend his permit to protect the public. The Corps ability to protect the public interest in the navigable waters would be seriously weakened if the Army were to grant irrevocable permits. Permittees agree to their permits knowing they are revocable. However, permittees also know that the Army rarely revokes a permit, and that permits only are revoked for good cause after permittees have been afforded an opportunity for a fair hearing. The Army's permit program has functioned fairly and efficiently for almost a century using revocable permits and we see no merit in irrevocable permits.

c. The ABA proposal's second section would extinguish the no compensation rule of the navigation servitude for all fills inside bulkhead lines or for fills which have received Corps permits. The Army would strongly oppose such a wholesale abandonment of the public's rights in the navigable waters. In the future, the Government may have a need to develop, in the interest of navigation, navigable waters which have been filled pursuant to revocable permits. The navigation servitude now protects the navigation interests of the public in those areas.

16. To your knowledge, has the constitutionality of any Congressional declaration of non-navigability been challenged in court?

To our knowledge, the constitutionality of declarations of non-navigability has not been challenged in court.

TESTIMONY OF
WILLIAM P. HANKOWSKY
DIRECTOR OF COMMERCE
CITY OF PHILADELPHIA
BEFORE THE UNITED STATES SENATE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

JULY 29, 1988

William P. Hankowsky
Director of Commerce
City of Philadelphia
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Philadelphia, PA 19102-1684

Mr. Chairman, Members of the Committee, I am William Hankowsky, the Director of Commerce for the City of Philadelphia. I am testifying today on behalf of the City of Philadelphia at Mayor W. Wilson Goode's request. As Director of Commerce, I am the Mayor's designated official responsible for economic development activity in the City. In that capacity, I am a member of the Philadelphia City Planning Commission, and I am on the Board of Directors of the Philadelphia Port Corporation and the Philadelphia Industrial Development Corporation.

I want to thank the Committee for the opportunity to bring to your attention a matter of great importance to the City, namely the revitalization of our waterfront, and to ask for your support for legislation to remove the federal navigation servitude from certain waterfront parcels that are part of this revitalization. Without this legislation, our plans for this area will not be possible.

The Delaware River has enabled Philadelphia to develop into one of the largest cities and ports in North America and into a major center for trade and commerce. At one time, Philadelphia's riverfront was devoted almost exclusively to shipping and maritime activities. Piers and wharves stretched all along the Delaware River. Such commerce was a key component of the City's economy and was strongly supported by the City.

However, as Mr. LaRue, the President of the Philadelphia Port Corporation, who is with us today, will testify, the shipping industry, along with other forms of transportation, has changed dramatically over the years. New technology and new approaches to shipping, such as containerization, inter-modal shipments, and larger vessels, have changed the face and the needs of this industry. These developments have made it easier to ship goods faster and more efficiently. Philadelphia has responded to these changes by developing new and modern cargo handling facilities along the riverfront.

As the City's Director of Commerce, I see on a daily basis the important role that the port plays in our economy and Mr. LaRue will speak to the City's commitment to improving our port facilities to maintain and continue to attract cargo. In sum, the Port is a major employer and generator of economic activity in our City and region and we are doing everything possible to enable it to remain that way. But, as I said, the riverfront is changing -- we are not changing it -- the shipping world is and it is the City's responsibility to deal with the consequences. Shipping today is handled at fewer and more capital intensive facilities. This has caused a shift in operations away from Philadelphia's central riverfront to portions of the Philadelphia waterfront north and south of the central district. This trend is clearly evident to anyone who has driven along the Delaware River in Philadelphia in the past few years. The view consisted, and to a considerable extent still consists, of block after block of obsolete wharves and piers. In many cases, the remnants of what was once bustling activity are now only a few rotten pilings sticking up above the water line.

At the same time that these once productive facilities have been abandoned, the City has been faced with the need to find new space for growth, to increase its housing stock and to add to its tax base, without tearing down existing structures elsewhere in the City and relocating citizens.

This situation has presented a real challenge to Philadelphia - how to redevelop the central riverfront so we can get the best use out of what should be, but is not at the moment, a valuable resource. We want to create jobs, public recreation, housing, and tax revenues to be used both by the City and the Port Corporation, which also stands to be the beneficiary of these projects.

In the 1970's, the City began a planning and development process for the area's rehabilitation. The process went through several iterations about which Mr. Schelter, who was then a member of the City's Planning Commission, will testify this morning. The culmination of that process was the City's issuance of the Central

Riverfront District Plan, which I have here with me. As a member of the team that has been involved in this process, I can tell you that the City has devoted a tremendous amount of time and energy to meeting the challenge we face. Over the last decade, the public and a host of city, state and federal agencies have been involved in developing and implementing the Central Riverfront Plan. This plan takes a careful, balanced approach to development and calls for mixed-use projects, such as the five that are dependent upon the proposed legislation. These projects will consist of new residential neighborhoods, parks, offices, retail shops, light industrial facilities and marinas. As part of the Plan, we are also requiring that all waterfront projects provide open, public access to the river, access that is not presently available because of the rundown condition of the piers. These five projects will all meet our goals of more housing and jobs for the people of Philadelphia and a larger tax base for the City.

The City's Plan, however, faces an obstacle that will prevent its realization, i.e., the federal navigational servitude. We understand that the federal servitude would allow the Army Corps of Engineers to order the removal of the piers, including the hundreds of millions of dollars worth of apartments, condominiums and offices, without compensation. Title insurance companies list the government's right as an exception in title insurance policies, which has the effect of rendering the property unmortgageable. Consequently, this right to take without compensation creates an impediment to financing which makes the development of these projects impossible.

I understand that title companies may ignore the problem in situations where it would be absurd for the government to order the removal of improvements made a long time ago. For new projects such as we have here, however, the danger of a possible forced removal without compensation is viewed as a risk that title insurers and bidders will not accept. Where there is no historical established use of the land, title companies are unwilling to insure marketable title and banks are unwilling to lend the necessary funds.

The City faced this issue of the servitude sixteen years ago in connection with the Penn's Landing project, the first stage in our riverfront development. Congress helpfully responded to the situation in 1972 when it enacted legislation that removed the servitude for that project. The legislation we are seeking today would similarly remove the servitude as to these additional five projects, which are located around the area covered by the 1972 legislation.

We have been working with developers and title insurers to try to deal with the financing and title insurance obstacle represented by the federal servitude and can tell you that, without this legislation, the City will not be able to get these projects off the ground. Instead of vital new communities along the Delaware River, we will be left with obsolete piers, a waterfront that we cannot use, and housing and employment needs that will not be met.

On behalf of Mayor Goode and the people of the City of Philadelphia, I urge you to support the proposed legislation and enable us to fulfill our Central Riverfront Plan.

Thank you for this opportunity to speak with you today.

TESTIMONY OF
JOHN P. LARUE
PRESIDENT
PHILADELPHIA PORT CORPORATION
BEFORE THE UNITED STATES SENATE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

JULY 29, 1988

John P. LaRue
President
Philadelphia Port Corporation
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Philadelphia, PA 19106

Good morning, I am John P. LaRue, President and Chief Executive Officer of the Philadelphia Port Corporation. I am here to speak about the Port Corporation's support for legislation that would remove the navigational servitude from certain areas on the Central Philadelphia Waterfront.

To begin, I would like to tell you what the Philadelphia Port Corporation is and what it does. Established in 1965, the Port Corporation is a quasi-public, non-profit agency of the City of Philadelphia, the Commonwealth of Pennsylvania and the Greater Philadelphia Chamber of Commerce. The Port Corporation's purposes, as listed in its charter, include:

A) the promotion of waterborne commerce;

B) the maintenance and modernization of the port's cargo handling facilities; and

C) the implementation of a program for the development of the Port of Philadelphia's cargo potential.

To achieve these goals, the Port Corporation owns and operates an extensive system of modern shipping facilities. However, the Port Corporation also owns or is the lessee of older facilities, consisting primarily of piers and wharves that are no longer used for port activities. To enable us to deal with these facilities, our corporate charter was amended in 1986 to include a provision authorizing the Port Corporation "to lease facilities, not essential for the handling of cargo, for industrial, commercial, residential or recreational use to permit the waterfront of the City of Philadelphia to offer amenities competitive with other East Coast cities." Piers 53 South and 24 North are two such facilities that we hold under a long-term lease from the City of Philadelphia and that are no longer capable of, nor necessary for, handling cargo. We are in the process of developing Piers 53 South and 24 North. These piers are part of two of the five projects for which we are here today to request that the federal navigation servitude be removed to enable development to proceed. I want to point out that we do not own or lease any of the other piers relating to the five projects and, as President of the Port Corporation, my testimony as to specific projects deals only with our two piers.

From its founding over three hundred years ago, Philadelphia has been a major port city. In the last two decades, enormous changes in the international shipping industry have brought Philadelphia's port to a critical juncture. To assure Philadelphia's continued maritime future, the Port Corporation has embarked on a program of internal reorganization and physical renewal. As part of this program, the Port Corporation is seeking funding from the Commonwealth of Pennsylvania for an extensive capital improvement program. This program is essential for the port's ability to remain competitive. It will provide at least $35 million dollars for port-related capital projects, consisting of general port infrastructure, cargo-specific capital projects and equipment modernization.

Although the primary purpose of the Port Corporation is the promotion of waterborne commerce and the creation of port-related jobs and revenue for the local economy, it also must address those portions of Philadelphia's waterfront that are no longer suited for maritime related activities. In the last three decades, the shipping industry has experienced great technological changes. Containerization, larger and more sophisticated vessels and intermodalism are but three aspects of a general shift from a labor-intensive shipping industry to one that is very capital intensive. To be competitive, Philadelphia had to adapt to these changes.

Many of our older wharves and piers were not adaptable to the new realities of the shipping industry. Many are finger piers too small to handle the cargo capacity of larger vessels. Many lacked the infrastructure required to sustain the new equipment needed for the loading and discharging of today's cargo. Moreover, with more efficient equipment, we need fewer piers than in the past. As a result, port activity has shifted from the Central Riverfront District to areas to the north and south. That created a need to find alternate uses for what became obsolete central waterfront property.

The Port Corporation plays a very active role in determining just what should be done with these piers. Moreover, since the Port Corporation leases two of the parcels covered by the proposed legislation, any development plans must be approved by our Board of Directors.

It should be helpful for the Committee to know that all five of the waterfront locations covered by the proposed legislation have not been used in active maritime trade for decades. In fact, for some of them, the term "pier" is deceptive, since they lack any superstructure and consist only of rotting pilings barely visible above the waterline. They are an eyesore for the waterfront and the surrounding community. It is in the public interest that these sites be developed for residential and commercial use. First, State and City government have a responsibility to provide a safe and liveable environment for our citizens. Second, the State and City also have a responsibility to provide the necessary infrastructure to enable business to operate. Third, once the sites held by the Port Corporation are developed, they will provide a steady revenue stream to the Port Corporation which will be used for the enhancement and expansion of the port's existing maritime facilities. Those sites to be developed but not held by the Port Corporation will, when developed, generate new tax revenues for the City of Philadelphia.

Since the Philadelphia Port Corporation is primarily concerned with maritime activity and not commercial development, it has retained the services of the Philadelphia Industrial Development Corporation (PIDC) to oversee the development of non-maritime related property along the waterfront. The Committee will also be hearing from the Executive Vice President of PIDC, Mr. Schelter, who will describe the scope of the waterfront projects included in the proposed legislation.

The Port Corporation does not see a conflict between commercial development and maritime activity as long as commercial development does not occur at the expense of our working marine terminals. The piers which we seek to have removed from the navigational servitude meet this test. I have assured the port community, labor and management that Philadelphia will continue to be a great maritime center. I believe that the proposed projects will enhance our port through increased revenues and will in no way impede our ability to continue to develop our port. We will continue our efforts to increase cargo, expand our marine facilities and do all that we can to remain competitive with other seaports. But for those facilities that are no longer useable in today's maritime business, it makes sound public policy and economic sense to develop them for new uses.

Therefore, in the interest of balanced and controlled development, I urge you to approve the legislation declaring certain portions of the Delaware River Waterfront non-navigable. Thank you. I will be pleased to answer any questions.

TESTIMONY OF G. CRAIG SCHELTER
EXECUTIVE VICE PRESIDENT
PHILADELPHIA INDUSTRIAL DEVELOPMENT CORPORATION
BEFORE THE UNITED STATES SENATE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

July 29, 1988

G. Craig Schelter
Executive Vice President
Philadelphia Industrial Development
Corporation
123 South Broad Street
Philadelphia, PA 19109

I. INTRODUCTION.

Mr. Chairman, Members of the Committee, I am Craig Schelter, Executive Vice President of the Philadelphia Industrial Development Corporation. I am here this morning to testify on behalf of the City of Philadelphia and its waterfront development community. Accompanying me are representatives of the projects proposed at five parcels which are the subject of the legislation the City is seeking.

I am here to support the proposed legislation, which would declare certain sites along the Delaware River in Philadelphia to be non-navigable for the purpose of removing the navigational servitude of the United States. We in Philadelphia consider this legislation to be critical for the City's Central Riverfront Plan. I would like to thank you, Mr. Chairman, and the Members of the Committee for your consideration in giving us this opportunity to explain to you what we are trying to achieve and why there is such a critical need for this legislation. Without it, I am gravely concerned that the City's central waterfront development plan will be stymied.

II. THE PHILADELPHIA INDUSTRIAL DEVELOPMENT CORPORATION ASSISTS IN THE PLANNING AND DEVELOPMENT OF PHILADELPHIA.

The Philadelphia Industrial Development Corporation is a quasi-public corporation which was formed in 1958 as a non-profit partnership of the City of Philadelphia and the Greater Philadelphia Chamber of Commerce. PIDC has financed over $2.5 billion in projects and managed major commercial and industrial development projects in the city, including the Philadelphia International Airport, the Market Street East Development, and the Philadelphia Center for Health Services. In recent years, because of Philadelphia's growth, PIDC has been asked by the City to expand its role beyond the traditional financing and land development programs, and has become a comprehensive economic development vehicle for the City of Philadelphia.

In its management role for development along the Delaware riverfront, PIDC currently functions as agent under contractual agreements with the Philadelphia Port Corporation and the Penn's Landing Corporation, a quasi-public corporation. The PIDC is also active in overall City planning and PIDC's President is a member of the Philadelphia City Planning Commission.

III. THE DELAWARE RIVER PLAYS A KEY ROLE IN PHILADELPHIA'S ECONOMY.

The Delaware River has shaped the urban form of Philadelphia for three centuries and has made the City one of the world's major ports and a center for trade and manufacturing. The Delaware River in Philadelphia extends twenty-one miles from the northern city boundary in Torresdale downriver to the southern boundary at Fort Mifflin. Approximately 76,000 persons -- or 10 percent of the City's total workforce -- are employed within the riverfront district. Port activity alone is directly responsible for the employment of 34,000 workers, providing annual economic benefits of $1.5 billion to the local economy.

At one time, the Delaware River waterfront was almost entirely devoted to port and port-related uses. However, as Mr. LaRue, the President of the Port Corporation, points out, changes in shipping technology have caused changes in the use of the historic waterfront. New facilities had to be, and have been, built to meet these changes. But many older wharves and piers were too small or lacked the necessary infrastructure to accommodate the new technology and could no longer be used for shipping purposes. Furthermore, changes in shipping techniques meant greater efficiency so that not as many piers are needed today as they were years ago. Consequently, a great number of piers became obsolete, went out of use, and deteriorated as port activity shifted to areas north and south of the Central Riverfront. Today, while a substantial portion of waterfront property remains under the authority of the Port Corporation and is used for shipping, a significant amount of land, consisting primarily of the obsolete piers, is currently available for development.

IV. THE CITY HAS TAKEN A COMPREHENSIVE APPROACH TO RIVERFRONT PLANNING.

Given the changes that have taken place on the riverfront over the last few decades, the City was confronted with need to develop a comprehensive plan that would address how the waterfront could best meet the needs of the people who live and work in the Philadelphia area. In response, the City began a process to take a careful, comprehensive and balanced approach to development.

Beginning in 1960, the City adopted a plan that provided the impetus for the Penn's Landing project -- the centerpiece of the central waterfront district. That project was made possible, in large part, through legislation enacted in 1972, which removed the navigational servitude of the United States from the portion of the riverfront where Penn's Landing is sited.

The 1960 plan was followed by a 1975 study in which the Philadelphia City Planning Commission conducted an inventory of riverfront land and a survey of riverfront uses. This study indicated that approximately one thousand acres of riverfront land could become available for development during the next decade and that most of this land was controlled by the City and a small number of large users. The study specifically determined that the future needs of the port also had to be assessed before a comprehensive plan could be prepared.

In 1978, Philadelphia commenced the preparation of an extensive series of studies and plans to determine the most effective way of using the river to serve the public interest. The City devoted tremendous resources to this effort, which took several years to complete and resulted in the Comprehensive Riverfront Plan. The Comprehensive Plan examined all elements of the riverfront -- its ports, highways, industries, residences, recreational facilities and environmental conditions -- and prescribed actions for immediate implementation as well as a long-term development course which emphasized diversity among competing uses.

As part of the Comprehensive Plan, the City Planning Commission undertook a special study of the Central Riverfront District, which is the focal point for today's resurgence of public interest in Philadelphia's riverfront. Extending from Spring Garden Street in the north to Reed Street in the south, this area offers unparalleled opportunities for many types of new development. It was on the Central Riverfront and adjacent lands that the City's first commercial, residential and administrative centers were developed. Over time, the Central Riverfront became the center of port activity in Philadelphia. Today, however, the Central Riverfront is no longer a part of the City's port activities, which have become concentrated elsewhere along the river. This largely abandoned area must, therefore, serve a different role, though one no less crucial to the future economic viability of the City. Where cargo ships once docked, opportunities now exist for new residential, recreational, cultural and commercial development.

The Central Riverfront Plan contains specific land use and urban design recommendations and provides a set of policies which serve to guide future development in a manner consistent with overall City goals and objectives.

Since my days at the Philadelphia City Planning Commission, the initial ideas have progressed from the drawing board to reality and our goals are being realized. The redevelopment of this two-mile stretch of central waterfront in downtown Philadelphia is now well under way. In 1986 the Great Plaza was completed and the development of the Philadelphia Marina Center followed in 1987. The Coast Guard recently completed its new headquarters, which serves as a southern anchor to the plan.

The public sector's role in the development of Philadelphia's riverfront is evidenced by the amount of related capital expenditures. Since 1970, over $2 billion in public funds has been devoted to development of the riverfront: one billion dollars on marine terminals, the airport and expressways in order to provide modern, integrated transportation facilities which are essential to efficient, competitive enterprise, and another billion dollars for water pollution control to restore the ecological state and the recreational capacity of the Delaware River. In addition, over $143 million of private investment is now in place on the waterfront and up to an estimated $1 billion more is expected for future development.

Nearly 4,000 permanent jobs and $1.3 billion in direct city benefits are projected by the time these plans are implemented. The Commonwealth of Pennsylvania will derive over $370 million in direct state benefits from the planned development. Moreover, by focusing on residential and commercial use, not only have we created economic vitality, but we are providing public access where none now exists to one of the nation's great rivers.

V. THE FEDERAL NAVIGATIONAL SERVITUDE PREVENTS PHILADELPHIA'S CENTRAL RIVERFRONT PLAN FROM MOVING FORWARD.

A. The Five Projects for Which Legislation Is Sought Are Part of Philadelphia's Central and North Delaware Riverfront Plan.

We have five major development projects that are getting underway as part of the City's Central Riverfront Plan. Each of these projects will meet the City's development goals by providing jobs, housing, cultural activities, recreation, and tax revenues in areas that are now useless eyesores. In the case of each project, the Commonwealth owns the land underlying the piers. The Commonwealth is expected to enter into a long-term lease of the land with the City which, in turn, will sublease the land to the developers. In the case of two parcels, Pier 53 South and Pier 24 North, ownership of the piers is in the City of Philadelphia, which leases to the Port Corporation, which, in turn, would sublease them to the developer. In the other cases, the developers own, or will own, the piers and improvements subject to the Commonwealth and City lease and sublease arrangements just described.

The projects are as follows.

1. Liberty Landing (Piers 53, 55, 56 and 57 South)

Liberty Landing Associates proposes to construct a mixed-use project known as "Liberty Landing" at Piers 53, 55, 56 and 57 South, which are located south of Washington Avenue on the Delaware River. Liberty Landing will be a unique, water-oriented project, consisting of a major hotel, retail space, office space, various types of residential units, a yacht club and a marina. The project will also include on-site parking and new access roads.

2. Marine Trade Center (Pier 24 North)

Pier 24 North, located north of Callowhill Street, is the northernmost pier that is part of a development known as the Marine Trade Center, which also includes Piers 12, 13, 15, 17 and 19. The piers in this project, other than Pier 24, were included in the 1972 federal legislation that removed the navigation servitude from a portion of Philadelphia's Central Riverfront. The Marine Trade Center, which incorporates the piers and the water area between them, consists of a merchandise mart, a full service marina, storage facilities, a restaurant, and a yacht club.

3. Marina Towers/World Trade Center (Pier 25 North)

Pier 25 North is part of a 5.25 acre site located at Callowhill Street and will be developed by Silver Harting and Company. The developer proposes to construct a major mixed-use project, consisting of three office buildings that would include retail space and ancillary on-site parking.

4. National Sugar Company Site (Piers 40 to 50 North)

The National Sugar Company site is located between Poplar and Shackamaxon Streets and consists of Piers 40 to 50 North. The site contains industrial facilities and vacant land. The developer proposes to construct a mixed-use project consisting of commercial space, residential units, a marina, and on-site parking.

5. Rivercenter (Cramp Shipyard)

This forty-three acre site, known as Riverside Industrial Park, consists of vacant land located near Richmond and Dyott Streets north of the central riverfront district. Rivercenter Incorporated, the developer, proposes to develop the site for light industrial and manufacturing use to include showroom, distribution and office space as well as other uses consistent with the area's zoning.

B. The Federal Navigational Servitude Prevents These Five Projects From Going Forward.

These five projects represent approximately $550 million in investments in the City. They are turning unused, dilapidated piers that, in their present state, are unsafe and unsuitable for public use, into vital, new communities providing jobs, homes, and recreational centers for the people of the Philadelphia area. What stands in the way is the fact that the piers on which the projects are to be built are subject to the federal navigational servitude.

As this Committee is well aware, the navigational servitude is a power, derived from the Commerce Clause of the Constitution, which allows the federal government to order the removal of projects on navigable waters without compensation. Title insurance companies list the servitude as an exception in their title policies, thereby preventing the developers from obtaining clear title. Without clear title, the developers cannot obtain the necessary financing for these important projects, the projects cannot go forward, and the City's Central Riverfront Plan cannot be implemented.

We faced this same situation in 1972, when the City sought to begin development of the Penn's Landing project. In recognition of the obstacle presented by the servitude and to enable development to proceed, Congress enacted legislation that removed the navigational servitude, thereby allowing the City's plans to go forward. We understand that since 1900 Congress has enacted similar legislation in over seventy instances.

We are here before you today to request your support for federal legislation that would similarly remove the navigational servitude from these five additional sites along Philadelphia's Central Riverfront and thus provide that there would be compensation if the federal government were to require these projects to be removed. This will enable the developers to obtain clear title, the financing to be arranged, and the City's Central Riverfront Plan to move forward.

The public interest is clearly served by the removal of the servitude. First, as I have mentioned, and cannot emphasize too strongly, the properties in question consist of obsolete, rundown piers that have not been used for maritime purposes for years and for which no maritime use is contemplated. Indeed, these piers are dangerous eyesores that effectively act as a barrier preventing the people of Philadelphia from using the Delaware River. In their place could be waterfront parks, walkways, marinas, and restaurants enhancing public access to the waterfront. The projects will change the status quo by (1) allowing the public to once again gain access to this valuable resource, (2) providing jobs and housing to the people of Philadelphia, and (3) expanding the City's tax base. Second, the public is fully involved in, and is supportive of, this process since the developers' plans cannot go forward without approval from the Philadelphia City Planning Commission, City Council and the Mayor. Third, the public will continue to be involved once the projects are built since the Commonwealth will continue to own the underlying land and the City would have a lease-hold interest. Fourth, the proposed legislation would not remove the U.S. Army Corps of Engineers regulatory authority under Section 10 of the Rivers and Harbors Act of 1899 or Section 404 of the Clean Water Act of 1977.

In summary, we respectfully submit that, in this case, the public benefits of removing the servitude and developing this important urban resource heavily outweigh any benefits in maintaining the servitude on the unused and unusable piers.

VI. CONCLUSION

In conclusion, we urge the Senate Environment and Public Works Committee to support the legislation necessary to ensure continued development of our waterfront. I thank you, Mr. Chairman, for the opportunity to inform the Committee of Philadelphia's efforts to bring economic growth and vitality to its riverfront. I, and those accompanying me today, would be pleased to answer any questions you may have.

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DIRECT DIAL NUMBER

August 17, 1988

The Honorable Robert T. Stafford
Ranking Minority Member
Committee on Environment
  and Public Works
458 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Stafford:

I enclose the responses of the following persons to your questions in connection with the hearing held before the Committee on July 29, 1988:

1. William P. Hankowsky
   Director of Commerce,
2. John P. LaRue
   President
   Philadelphia Port Corporation,
3. Craig Schelter
   Executive Vice President
   PIDC.

Please let us know if you have any further questions.

Very truly yours,

Richard J. Leidl

Richard J. Leidl

Enclosure
RJL/ms

RESPONSES OF WILLIAM P. HANKOWSKY, DIRECTOR OF COMMERCE, CITY OF PHILADELPHIA, TO QUESTIONS FROM SENATOR STAFFORD

1. Question: Mr. Hankowsky, you say in your testimony that title companies may ignore navigation servitude where it would be absurd for the federal government to order the removal of improvements made long ago. Why do you believe they would view it as any less absurd for the federal government to order the removal of more recently constructed multi-million dollar improvements?

Response: In some cities, you may have situations where large tracts along the river were gradually filled in, and buildings constructed on the filled-in areas, in the 1800s as downtown areas expanded. You may have buildings that are on fill but, because of years of expansion, are now actually several blocks from the river itself. These buildings may still be subject to the navigation servitude. However, it would seem highly unlikely that the Army Corps would tear down several city blocks to expand the river to lines that existed a hundred years ago. Thus, a title insurance company may determine that it has virtually zero risk of the Army Corps taking the property under the servitude without compensation. Our case is completely different from that scenario. Our development is occurring right on the Delaware

River along the existing pierhead lines. Consequently, the likelihood of the Army Corps doing something to affect our projects is far greater. As a result, title insurance companies simply can not assume the risk that the Army Corps may order the removal of the projects without compensation, particularly since these projects will cost about $550 million.

2. Question: Does the City have requirements for affordable or low income housing in the planned residential developments?

Response: The City has no requirements for low income housing in the residential developments covered by the proposed legislation. The City does have an overall housing program which selects areas and projects as sites for low income housing. The residential components of the proposed projects are not part of this program.

3. Question: Have the specific plans of the developers been approved by the City?

Response: As indicated in the Central Riverfront District Plan, the Philadelphia City Planning Commission has established the basic goals and guidelines for development along the waterfront. The Planning Commission has reviewed preliminary plans and endorsed the basic development concepts. However, we do not expect the formal approval process to begin until the navigation servitude is removed.

Dated: August 17, 1988

RESPONSES OF CRAIG SCHELTER, EXECUTIVE VICE PRESIDENT, PHILADELPHIA INDUSTRIAL DEVELOPMENT CORPORATION, TO QUESTIONS FROM SENATOR STAFFORD

1. Question: Mr. Schelter, specifically how many new housing units will be created as a result of the proposed developments? Could you please provide some estimate as to the anticipated price range of these units? Will there be any requirements by the City of Philadelphia to provide low income or "affordable" housing as part of these developments?

Response: The proposed developments are planned to have a total of 2,000 new housing units. As a result of high infrastructure and construction costs, the new units will be priced in the range of $300,000 and up. There are no City requirements for the provision of low income housing on the Central Riverfront.

2. Question: As is evidenced by your and the other witnesses' testimony, developing these sites so that there can be public access to the waterway where there is none now is of great concern to the City and its citizens. Would it not be possible for the City of Philadelphia to develop public access to these areas without the proposed developments going forward? Has such a possibility ever been discussed?

Response: Except for Penn's Landing, which was the subject of the 1972 legislation removing the navigation servitude, the Central Riverfront consists of dilapidated piers and overgrown riverbank areas that make it virtually impossible for the public to use the waterfront. The 1982 Central Riverfront District Plan emphasized the need to provide public access to the Delaware River and to connect the various projects along the Central Riverfront District. In 1983, the City Planning Commission determined that this pedestrian walkway, known as Riverwalk, would run about three miles from Penn Treaty Park to Queen Street and would be an integral part of the overall waterfront development project. The City itself does not have the necessary funds to provide this important public access to the river, which would require not just the Riverwalk itself, but all the related improvements, including removal of rundown piers and other structures, placement of utility lines, and construction of the necessary infrastructure. Under the Central Riverfront Plan, the developers, not the City, will pay for the construction of Riverwalk; yet it is the public that will be able to use it.

3. Question: For each proposed development, please list when you would expect necessary federal permits to be sought.

Response: The developers will not apply for federal permits until the navigation servitude issue is resolved. If the proposed legislation is enacted shortly, permit applications would probably be submitted as follows:

Liberty Landing (Piers 53-57 South)	Fall, 1988
Marine Trade Center (Pier 24 North)	Summer, 1990
Marina Towers/World Trade Center (Pier 25 North)	1st Quarter, 1989
National Sugar Company Site (Piers 40-50 North)	Late 1989-90
Rivercenter (Cramp Shipyard)	As soon as possible. Preliminary discussions with the Army Corps have been initiated.

4. Question: Have the specific development plans been approved by the City yet? If not, please describe this procedure and the estimated time it will take.

Response: The projects have been reviewed and approved conceptually in order to be included in this proposed legislation and are in keeping with the guidelines of the Central Riverfront District Plan. While the formal approval process for particular projects may vary, each project will be reviewed by the City Planning Commission and must comply with all applicable zoning and building code requirements. The City's review and permitting process generally takes six to twelve months. At this time, the developers are unable to proceed with further detailed analysis and design until the navigation servitude issue is resolved so that clear title and financing can be obtained.

5. Question: How much in increased tax revenues can the City of Philadelphia expect from the proposed developments?

Response: The City and the Commonwealth will receive substantial tax benefits from the projects, estimated at almost $1.3 billion over a thirty-year period. In addition, the projects would generate about 4,231 full-time jobs. Set forth below is an analysis of the tax benefits and jobs for each project.

	City Tax Benefits	State Tax Benefits	Jobs (Full-time/ Permanent)
Liberty Landing (Piers 53,55, 56 and 57 South)	$284,864,100	$ 78,914,200	1,016
Marine Trade Center (Pier 24 North)	72,447,600	20,069,700	254
Marina Towers/World Trade Center (Pier 25 North)	113,983,700	30,277,800	320
National Sugar Company Site (Piers 40 to 50 North)	277,782,900	192,854,300	1,041

Rivercenter (Cramp Shipyard)	192,501,600	32,119,500	1,600
Totals	$941,579,900	$354,235,500	4,231

Total City & State Tax Benefits = $1,295,815,400

6. Question: What type of light industries will be developed at the Cramp Shipyard site?

Response: The proposed development plan for Rivercenter (Cramp Shipyard Site) includes showroom, distribution, assembly, computer repair, file, storage and retail/commercial activities. The site is zoned "G-2" General Industrial. Allowable uses in a G-2 District are described in the attached section from the Philadelphia Zoning and Planning Code.

7. Question: For the record, please list the owners of each property involved in the proposed developments.

Response: In the case of each project, the Commonwealth owns the land underlying the piers. The Commonwealth is expected to enter into a long-term lease of the land with the City which, in turn, will sublease the land to the developers. In the case of two parcels, Pier 53 South and Pier 24 North, ownership of the piers is in the City of Philadelphia, which leases them to the Port Corporation, which, in turn, would sublease them to the developer. In the other cases, the developers own, or will own, the piers and improvements subject to the Commonwealth and City lease and sublease arrangements just described. The developers for the specific projects are as follows:

1. Liberty Landing (Pier 53-57 South)

   Liberty Landing Associates
   Sheet Metal Workers' International Association
   Local Union 19
   1301 South Delaware Avenue
   Philadelphia, PA 19147

2. Marine Trade Center (Pier 24 North)

   Philadelphia Marine Trade Center Association
   1800 Penn Mutual Tower
   510 Walnut Street
   Philadelphia, PA 19106

3. Marina Towers/World Trade Center (Pier 25 North)

   Silver, Harting & Company
   23 North Third Street
   Philadelphia, PA 19106

4. National Sugar Company Site (Pier 40 North)

   Asbell & Associates
   234 North Delaware Avenue
   Philadelphia, PA 19106

5. National Sugar Company Site (Piers 41-47 North)

   Sugar House Realty, Inc.
   Route 309 & Hilltop Road
   Coopersburg, PA 18036

6. Riverside Industrial Park (Cramp Shipyard)

   The Seltzer Organization
   401 Office Center Drive
   Fort Washington, PA 19034

Dated: August 17, 1988

be focused upon the sign itself, so as to prevent glare upon the surrounding areas.

(e) Signs with flashing or intermittent illumination shall neither be erected within 100 feet of any residential district, nor face any residential district within 200 feet of the sign.

(f) Signs which revolve shall require a Certificate from the Zoning Board of Adjustment.

(g) Any revolving devices which cause intermittent flashes of light to be projected shall be prohibited.

§14-508. "G-2" General Industrial District.

(1) *Use Regulations—General.* The specific uses permitted in this district shall be the erection, construction, alteration, or use of buildings and/or land for:

(a) The uses permitted in any Commercial or Limited Industrial District with all use qualifications removed, except that when any use is herein defined, listed or prohibited, the regulations of this district shall apply.

(aa) Outdoor advertising signs as permitted in Chapter 14-1604 of this Title.

(b) Auto, machine or wagon repair shop, including auto body and fender work and painting;

(c) Blending and compounding lubricating oils and greases from purchased mineral, animal, and vegetable materials;

(d) Brewing of malt and malt liquors;

(e) Canning of meats, seafoods, fruits, vegetables, soups, preserves, jams, jellies, and other foods; preparation of all foods and food products not specifically listed in any Least Restricted District;

(f) Carpet cleaning and repairing;

(g) Reserved.

(h) Distilling, rectifying, blending and/or mixing of alcoholic products;

(i) Killing, dressing, packing, and canning poultry, rabbits, and other small game, including cleaning, packing, grading, drying and freezing eggs;

(j) Laundry and dry cleaning;

(k) Lumber yards; coal yards; building materials storage; carpenter, plumbing, roofing and heating shops;

(l) Machine shops;

(m) Manufacture of:

(.1) Aircraft, including component parts and auxiliary equipment;

(.2) Apparel and garments of all sorts assembled from purchased rubberized fabrics or plastics;

(.3) Advertising displays and signs;

(.4) Baking powder, yeast, and other leavening compounds;

(.5) Brooms and brushes; morticians' goods:

(.6) Cleaning, polishing, and sanitation preparations, excluding soap and detergents;

(.7) Electric motors and generators; carbon and graphite products for electrical use; storage and primary batteries (wet or dry); electrical equipment for transmission and distribution (including power and specialty transformers); circuit-breakers; other electrical apparatus for industrial use;

(.8) Fabricated metal products, including metal cans; cutlery, hand tools and general hardware; heating apparatus and metal plumbing fixtures; fabricated structural metal products; screwmachine products (including bolts, nuts, screws, rivits and washers); metal stampings; fabricated wire products (except for rubber insulated wire); and other fabricated metal products, including pipes and pipe fittings;

(.9) Firearms, guns, howitzers, mortars, military tanks and components, torpedo-tubes, Y-guns, flame throwers, and other ordnance, except the manufacture, use, handling, or storage of explosives in any form;

(.10) Furniture, partitions, shelving, lockers, office and store fixtures, venetian blinds and window shades;

(.11) Games, toys, children's vehicles, sporting and athletic goods;

(.12) Glass, glassware and glass products; structural clay products; pottery, plumbing fixtures, china, earthenware and porcelain products; refractories and/or crucibles; concrete products; provided, that smoke controllers, dust collectors, exhaust washers, sediment tanks, or similar equipment to prevent escape of smoke and/or dust are installed and maintained;

(.13) Lead pencils, crayons, candles, artists' materials, carbon paper, inked ribbons, steel letters and figures for marking;

(.14) Leather footwear, leather footwear cut stock and findings, leather industrial belting and packing, and saddlery;

(.15) Locomotives, railroad cars, rapid transit vehicles, including component parts and auxiliary equipment;

(.16) Machinery, including engines and turbines; farm machinery and equipment; construction, mining and materials-handling machinery and equipment (including elevators and escalators); metal-working machinery and equipment, industrial machinery; and other machinery and parts;

(.17) Motor vehicles and motor vehicle equipment; motorcycles, bicycles, and parts; wheelbarrows; pushcarts; motorboats; sailboats; rowboats; lifeboats; canoes, and other boats; provided, that boat construction shall be limited to vessels of five gross tons or less;

(.18) Musical instruments and parts;

(.19) Perfumes, cosmetics, and other toilet preparations;

(.20) Phonograph records;

(.21) Photographic equipment and supplies;

(.22) Pickled fruits and/or vegetables (including sauerkraut); vegetable sauces, seasonings, and salad dressings;

(.23) Plastic articles, from purchased plastics;

(.24) Prepared meats and meat specialties;

(.25) Roasted coffee and coffee extracts;

(.26) Silverware; articles plated with silver, gold, or other metal; articles of nickel silver, pewter, or stainless steel tableware; provided, that any plating operation shall not occupy a total area of more than 2,500 square feet;

(.27) Vinegar; cider; flavoring extracts and syrups;

(.28) Wines, brandy and brandy spirits;

(n) Mixing and blending of paving materials such as cement, stone, asphalt, and sand; provided, that smoke controllers, dust collectors, exhaust washers, sediment tanks, or similar equipment to prevent escape of smoke or dust are installed and maintained;

(o) Painting, enameling, japanning, lacquering, oiling, staining, and/or varnishing, in completely enclosed buildings;

(p) Paper coating and glazing;

(q) Radio and television transmission, including towers;

(r) Repair of any product permitted to be manufactured in this district; provided, that this paragraph shall not be construed to limit repair uses specifically permitted in any Commercial or Limited Industrial District;

(s) Sawmills and planing mills; manufacture of millwork, veneer, plywood, and prefabricated structural wood-products; wooden containers, and kindred wood products;

(t) Stone cutting, shaping, and finishing, in completely enclosed buildings;

(u) Sugar or salt refining or finishing;

(v) Textile mills, and textile mill products; including woven fabric mills; knitting mills; dyeing and finishing; floor covering mills (except rugs of jute, burlap or sisal); yard and thread mills; manufacture of tire cords and belting cords; other kindred textile goods;

(w) Tire vulcanizing and retreading;

(x) Trucking and railroad freight terminals, yards, sidings and shops;

(y) Public service heat, light or power plant; provided, that smoke controllers are installed and maintained;

(z) Accessory uses, customarily incidental to any of the above permitted uses.

(2) *Use Regulations—With Certificate.* The following uses will be permitted in this district only if a Zoning Board of Adjustment Certificate is obtained:

(a) Storage or baling of junk, scrap metal, rags, waste paper and/or used rubber;

(b) Dismantling or wrecking of used motor vehicles, storage and sale of dismantled, partially dismantled, inoperative or wrecked vehicles or their parts;

(c) Public stable or dog kennel;

(3) *Prohibited Uses.* The specific uses which are prohibited in this district shall be the erection, construction, alteration, or use of buildings and/or land for:

(a) Any use or process specifically listed in any Least Restricted District;

(b) Dwellings, except such as are used for the residence of a caretaker, watchman, or custodian on the same lot with the principal use and located at least 10 feet from any other buildings;

(c) Hotels;

(d) Libraries, art galleries, and public museums;

(e) Hospitals, sanitaria, and eleemosynary and public welfare institutions;

(f) Open air theatre, motion pictures and other entertainment.

(4) *Area Regulations.*

(a) *Occupied Area.* Subject to the other provisions of this section, buildings may occupy 100% of the lot area.

(b) *Building Set-back Line.* No building set-back line shall be required.

(c) *Yards.*

(.1) *Front.* No front yards shall be required;

(.2) *Side.* No side yard shall be required, but if any is used, it shall have a minimum width of six feet;

(.3) *Rear.* No rear yard shall be required but if any is used, it shall have a minimum depth of eight feet.

(d) *Courts.* The minimum width of a court between the wings of

RESPONSES OF JOHN P. LARUE, PRESIDENT, PHILADELPHIA PORT CORPORATION, TO QUESTIONS FROM SENATOR STAFFORD

1. Question: Mr. LaRue, you mention in your testimony that your port is planning to make major capital improvements in cargo handling facilities in the near future. Will a non-navigability declaration be necessary before these improvements can go forward? If not, why not?

Response: A non-navigability declaration will not be necessary because these improvements will be at existing facilities.

2. Question: Has commercial tonnage at Philadelphia's port increased or decreased in the past few decades? Is traffic and tonnage expected to increase in the forseeable future?

Response: Commercial tonnage at Philadelphia's port has been relatively stable over the past few decades, but is expected to increase in the foreseeable future. We expect that the port's existing facilities, with planned improvements, will be able to handle this increase in traffic and that it will not be necessary to use the areas covered by the proposed legislation. Indeed, the areas to be covered by the legislation have not been in active maritime trade for decades and it is in the public interest that these sites be developed for residential and commercial use.

3. Question: I understand that the Corps of Engineers is presently studying a deepening and widening of the Delaware River channel near Philadelphia. Is this channel improvement premised on increased traffic and activity at Philadelphia's terminals?

Response: I understand that the channel improvement may be based on increased traffic in Camden, New Jersey.

4. Question: How much new marina capacity will be created for recreation boats by the proposed developments? Do you believe that the increased recreational traffic will present any problems with respect to existing or any expected future increases in commercial traffic?

Response: I understand from the Philadelphia Industrial Development Corporation that the Liberty Landing project will have 280 boat slips and docking facilities for visiting boats and that marinas may be added at Pier 24 and Rivercenter. The Port Corporation recognizes the importance of the channel to commercial traffic. As a result, the Port Corporation has taken steps to prevent recreational traffic problems from arising and will continue these efforts. In particular, existing marinas are required to offer water safety and boat handling courses and traffic is regulated at the marinas through traffic lights and exit and entry lanes. These programs will be continued at the new marinas. Furthermore, the new Coast Guard facility near Penn's Landing will help to regulate traffic along the waterfront.

5. Question: Mr. LaRue, how much and what types of hazardous cargo are shipped past the areas which are proposed to be declared nonnavigable? Have there ever been any accidents involving hazardous cargo in the vicinity of Philadelphia?

Response: Petroleum products are shipped to and from a tank farm at Pettys Island and petroleum products and chemicals are shipped to and from the Tioga Terminal. Both facilities are about two miles from the Central Riverfront. I am not aware of any accidents involving hazardous cargo in Philadelphia.

6. Question: What type of and how much revenue can the Port Corporation expect to see from the proposed development?

Response: The Port Corporation presently leases Piers 53 South and 24 North from the City for a nominal rent and will sublease these facilities to the developers. The specific rental rates to be charged the developers have not yet been negotiated. The revenues will be used by the Port Corporation for port-related purposes.

Dated: August 17, 1988

Testimony of the American College of Real Estate Lawyers Before The Committee on Environment and Public Works

by Eugene J. Morris

Attention: Quentin Burdick, Chairman
United States Senator

In your letter of August 1, 1988 you requested the American College of Real Estate Lawyers ("ACREL") to provide testimony for the written hearing record of your committee with respect to the general issue of the federal navigation servitude and the consequential implications of non-navigability declarations.

Specifically, you requested our views as to the effect of the servitude on waterfront development and requested us to address the following issues:

> "-- In recent years, significant waterfront development has proceeded in many areas of the country without congressional declarations of non-navigability. How is this possible if, as some title companies argue, navigation servitude presents an unacceptable "cloud" over some waterfront real estate?
>
> -- If navigation servitude does present special problems with respect to legitimate waterfront development, how would you recommend Congress address these problems and still protect the public interest without having to pass individual non-navigability declarations?"

I have been appointed by the College to respond to your inquiry on its behalf.

It should be noted at the outset that I have been actively engaged in matters concerning the navigational servitude for more

than 25 years, both as an attorney representing clients involved in the development of waterfront properties and on a pro bono basis representing the American Bar Association, as well as the American College of Real Estate Lawyers and various other organizations interested in the subject. In fact, I have in the past testified before congressional committees on the subject, notably before this committee as reported in the Congressional Record 91st Congress at pages 187 to 205 re S 4572.
(a copy of that testimony is incorporated by reference in this statement

In my prior testimony before your committee there was included an article written by John F. Turner, chairman of the subcommittee of the American Bar Association Committee on Public Regulation of Land Use of which I was the chairman. There was also published in the American Bar Association Real Property and Probate and Trust Journal an article in the Winter 1967 issue Volume 2, No. 4 which was the basis for Exhibit II in the congressional testimony previously referred to, entitled Zoning and Planning Law Report which was prepared by me (see p. 600 of the Journal).

Since my prior testimony before this committee and the article written by me, "The Federal Navigation Servitude: Impediment to Waterfront Development", published in the April 1981 Zoning and Planning Law Report, Vol. 4, No.4, at p. 113 (a copy of which is attached) covers the subject, it does not require repetition, except to describe the salient recommendations and to provide information on what has occurred with respect to the situation since 1969.

In my 1968 testimony before your committee I stated

"Private development of waterfront areas involving navigable waters has been seriously inhibited by the Federal Navigation Servitude. The Servitude affects all property which is riparian to navigable waters and it comes into play when land under navigable water is reclaimed, either by landfill or by the creation of platforms on piles. It constitutes a paramount right of the Federal Government under article I, section 8 of the United States Constitution (the Commerce clause) to compel removal of an obstruction to navigation, without the necessity of paying "just compensation," provided by the fifth amendment of the United States Constitution.

The existence of this power in the Federal Government impairs the development of areas subject to the Navigation Servitude because the threat of condemnation without compensation renders investment and financing hazardous. Title companies and lawyers list the Servitude as a title exception and as a result lenders will not make loans which are subject to the Servitude and title to such developments are unmarketable. Thus, the Servitude not only thwarts the development of much-needed waterfront property in urban areas, but it deprives many municipalities of the revenues which could be realized from these developments.

Section 403 of Title 33 of the United States Code authorizes the Secretary of the Army to establish harbor lines in navigable waters. Once such a line has been established, the owner of the property abutting the water is permitted to fill or build out to the harbor line, but not beyond. However, when this is done, the Federal Government nevertheless has the power to change the harbor line, to reenter the filled-in lands and to compel the removal of such improvements without the payment of compensation for the taking.

Congress has in the past recognized the need to eliminate this risk for particular land developments in special situations which have been called to its attention. In so doing, Congress has, in effect, ceded the Federal Government's right to removal without compensation by declaring nonnavigable the particular portions of shorefront water which are to be filled or to have structures built over them.

These declarations of nonnavigability are to be found in 33 U.S.C. § 21-59. This case-by-case approach by Congress has proven to be a most unsatisfactory way to deal with the problem of the Navigation Servitude. . . . some better method must be found to permit the development

> of underwater lands where the public needs for such development outweigh the possible impairment to navigation, and to afford to developers, public and private, some assurance in these situations that their investment in the development will not be forfeited if the Government should later decide that the improvements must be removed in aid of navigation."

In this connection a question was raised as to the constitutional validity of this method of declaration of non-navigability where the 1968 testimony stated that:

> "Since the rule is well settled that water which is navigable in fact is navigable in law, a constitutional question may arise over the authority of Congress to declare as nonnavigable, water which is in fact navigable and which has been judicially declared navigable."

The method suggested in the 1969 testimony as to the method by which U.S. Code Title 33 can be amended was as follows:

> ". . . . to authorize the granting of irrevocable permits for structures within and beyond harbor lines and to require compensation for taking or other action affecting filled land or improvements within harbor lines or where filled pursuant to permit, such amendments being in sub[tance] as follows:
>
> Section 403 be amended so as to read as follows (no part of the section being deleted and the additions being in italics):
>
> '"Sec. 403. Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in. The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures, *whether the same be temporary or permanent or in aid of or connected with navigation*, in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and

> authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or the channel of any navigable river of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same. The Secretary of the Army is authorized to grant revocable or irrevocable permits for the erection of temporary or permanent structures within or beyond harbor lines, as in his discretion shall appear to be appropriate, after notice and opportunity for hearing in such classes of cases and pursuant to such rules and regulations as he shall prescribe, and he may make any such permit effective for a specified period of years.'"
>
> A new section 404a be added reading as follows:
>
> "'Sec. 404a. (1) Whenever an area within the boundaries of navigable waters of the United States has heretofore been filled or shall hereafter be filled, as provided in Sub-paragraph (2) hereof, the United States shall, if it takes or otherwise affects the same, pay just compensation for the value of the land and improvements, or either of them, so taken.
>
> "'(2) In order for the area so filled to be affected by the provisions of Sub-paragraph (1) hereof, such area, at the time of such filling, must have been, or must hereafter be, inside the bulkhead line of an established harbor line, or, if such area be outside such bulkhead line, or be where no harbor line has been established then such area must have been, or must be, filled pursuant to plans recommended by the Chief of Engineers and authorized by the Secretary of the Army by permit issued under authority of Section 403.'"

As far as I know, no action on the subject has been taken by the Congress of the United States up to the present time. In the article published in April 1981 (annexed hereto) there is mentioned at p. 117 that a Senate Commission will be appointed by this committee of various agencies of the government to prepare a study of the question with respect to the navigational servitude, but to the extent that I have been able to investigate the situation, I have found no report or study made along these lines. If one has been made I would appreciate receiving a copy of it for further study of the matter.

Since the publication of my 1981 article (annexed hereto), there have been two significant cases affecting the navigation servitude ruled on by the United States Supreme Court.

One is the case of Kaiser Aetna v. U.S. 444 U.S. 164 (1979) which is discussed at p. 115 and 116 of my April 1981 article and which held that where waters, previously non-navigable were made navigable by the private owner, that did not have the effect of requiring the owner to make the newly created navigable waters available to the general public under the navigational servitude. The decision was by a 6-3 vote in which the dissenters characterized the decision as injuring "the freedom of commerce that the navigational servitude is intended to safeguard."

In 1987, however, the United States Supreme Court reaffirmed the paramouncy of the navigational servitude in the case of United States v. Cherokee Nation of Oklahoma, 107 S. Ct. 1487. A portion of the waters of the Arkansas River were ceded by treaty to inter alia the Cherokee Nation of Indians. Later the United States, in aid of navigation, dredged and deepened the bed of the river and removed sand and fill. The Cherokee Nation claimed that the United States had no right to do so and demanded compensation for the value of the sand and fill taken from the riverbed. The Court (unanimously) held that even though the river and its bed had been ceded to the Cherokee Nation it was entitled, under the navigational servitude, to dredge the river in aid of navigation and was not required to pay compensation under the Fifth Amendment, thereby affirming again the doctrine of the navigational servitude.

Mr. Wolf, Chairman of the Real Property Probate and Trust Law section of the American Bar Association who testified at the 1969 hearing of this committee characterized the servitude in words which are still true today. He said:

> "This servitude is an impediment which is not really necessary for regulation of navigation in very many situations. There is no way now, no matter how minor the navigation interest is below the high water mark in all of the little coves, nooks and crannies, that you can get protection that you can insure against.
>
> Particularly in the present market conditions lenders, if they can lend instead where this problem does not exist, will not lend on the waterfront.
>
> Decrepit conditions in many of our waterfront cities are due to this technical impediment.
>
> Surely, some better accommodation between the needs of our cities for waterfront rehabilitation and construction and the practical needs of navigation is possible."

It is still true that there has been no waterfront development in the major urban areas of this country, and as our population continues to grow and available land becomes more scarce, the situation can only worsen, unless some action is undertaken by Congress to alleviate this archaic obstacle. The specific suggestion of the Americal College of Real Estate Lawyers and the American Bar Association for amendment to 33 United States Code Section 403 or some similar type of legislation we believe will alleviate the situation and should be enacted without further delay.

With respect to the two question posed in your letter of August 1, 1988 we have the following observations to make:

There are several answers to the first question as to why waterfront development has proceeded in many areas of the country without any declaration of non-navigability by the Congress.

The first reason for this is that most of the instances of waterfront development which have occurred have been by governmental agencies at federal, state and local levels. These generally do not involve private ownership, do not require private financing and thus do not involve title company insurance. Thus the question does not arise as a rule where wharves, docks, industrial and shipping facilities, highways, bridges, etc. are involved, and they constitute the major source of existing waterfront development.

Moreover, where private development has occurred, much of it has been in situations where private developers, lenders and title insurance companies have been willing to assume a minimum risk. This is particularly so where the proposed development is landward of an open street or highway, or an already existing substantial structure where there is little likelihood of a taking by the federal government in aid of navigation.

In addition the process of obtaining an act of Congress declaring an area to be non-navigable is an expensive, time-consuming and frequently uncertain process. As a result, unless the contemplated project is a major venture involving large sums of money with strong political backing, it is not worth the effort and expense involved. This impediment leaves the developer with the alternative of abandoning the project (as most developers do), being willing to assume the relatively minimal risk of proceeding and taking a chance on the unlikely possibility that the government will act in taking the property under the provisions of the navigational servitude. Much also necessarily depends on the flexibility or willingness of the title company involved to assume the risk, particularly where the project is not a large one and the extent of the financial risk involved is small.

This may also be true where, although the overall development may be significant, it consists of several small parcels which involve a number of different developers, lenders and title companies where the risk entailed for each of the participants is de minimus.

The proposal for amending section 403 suggested in this memorandum we believe will accomplish the purpose posed in your second question.

Basically the Congress has conditionally delegated (by the enactment of U.S. Code Title 33 Section 403) the responsibility of determining when there has been or is proposing to be created an obstruction "to the navigable capacity of any of the waters of the United States." The only condition upon which this delegation of total authority is based is the overriding power of Congress to authorize affirmatively the creation of an obstruction to navigation, which it retains under the Commerce Clause of the Constitution. However, to all intents and purposes Congress has delegated the full power of determination to the United States Government Agency (the Secretary of the Army and the Corps of Engineers) best equipped technically to evaluate these highly specialized issues. Thus, there seems to be no logical or juridical reason for the Congress to retain what amounts to a veto power over any of the acts of the agencies involved in granting or refusing to grant permits.

Aside from the fact that the Congress is a legislative body ill-equipped to make such ministerial determinations, it has in effect recognized the inappropriateness of the constitutional delegation to it of this power by renouncing it almost in toto by its enactments in Title 33. The "almost", which must have seemed relatively harmless to the members of Congress (and possibly having been voted for by them in the 1880's out of deference to the framers of the Constitution) has had the effect now, as interpreted by the courts, to constitute a serious impediment to the development of the waterfront areas of the country.

In fact the allocation by the Constitution of this power over the administration of the navigable waters of the United States to the legislative body (the Congress) is unique among the separation of powers of our government. In most other instances these responsibilities are properly reposed in the executive branch of the government where they belong and where either the Constitution or the Congress by statute, has largely imposed them.

This modicum of retention of power has, however, had a profound effect on the administration of the program which could hardly have been anticipated by the framers of the Constitution and even by the congressmen who largely renounced the power, in the enactment of U.S. Code Section 33 in the 1880's.

This has come about as a practical proposition because of the fact that the power given to the Executive Branch is limited by the potential veto power retained by the Congress. As a result the Secretary of the Army and the Corps of Engineers have frequently refused to act, generally for political reasons, with respect to permit applications made to them. As a result where major waterfront development is contemplated, the Corps usually defers to Congress by refusing to act and all the ills ascribed to the existence of the navigational servitude in inhibiting development for inevitable resulted.

Reduced to its essentials it provides that a majority of both houses of Congress is required to act upon a local project for a waterfront development. The resolution of this type of issue inevitably becomes political because, as a rule, its resolution affects the district of only a few congressmen and is as a result a matter of little interest to the overwhelming number of members of both houses.

In contrast the proper role for the exercise of this administrative function should rest with the agency having the expertise to deal with it, particularly where the propriety of those actions are reviewable by the courts as in the case of any administrative action by a government agency. It is to accomplish this purpose that the proposed amendments to United States Code Section 33, Section 403 are aimed. No valid reason seems to exist for the perpetuation of so damaging a power as is presently retained by the Congress.

Respectfully submitted by The American College of Real Estate Lawyers.

By: EUGENE J. MORRIS

Dated August 24, 1988

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THE FEDERAL NAVIGATION SERVITUDE: IMPEDIMENT TO WATERFRONT DEVELOPMENT

by Eugene J. Morris

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- **Restrictions Imposed on Waterfront Development**
- **Congressional Declarations of Nonnavigability**
- **Public Need for Modification of the Doctrine**

Introduction

The federal navigation servitude is a legal doctrine which has been part of our history from the earliest colonial times and is rooted in the English common law concept of sovereignty. The servitude, which finds its legal basis in the Commerce Clause of the United States Constitution, art. 1, § 8; see *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), and which has been a matter of little concern for almost two centuries, is now being carefully scrutinized in view of its detrimental impact upon the use of waterfront areas in our overcrowded urban centers.

The navigation servitude is the paramount right of the federal government, under the Commerce Clause, to compel the removal of any obstruction to navigation without the necessity of paying "just compensation," such as is ordinarily required by the Fifth Amendment of the Constitution where there has been a taking in eminent domain of private property by the government. It has been held to apply up to the high-water mark of all waters which are "navigable in fact," *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870), whether tidal or nontidal, see *The Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851),

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n to nonnavigable tributaries of navigable , *e.g., Oklahoma ex rel. Phillips v. Guy F.* Co., 313 U.S. 508 (1941) and *U.S. v. Rio ande Dam & Irrigation Co.*, 174 U.S. 690 (1899). The servitude has also been interpreted, in *U.S. v. Martin*, 177 F.2d 733 (D.C. Cir. 1949), to apply to land extending back to the 1794 waterline, irrespective of whether the area was covered by natural accretion or fill since that time. Analysis of the judicial doctrine appears in Morreale, "Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation," 3 Nat. Res. J. (1963). See also Turner, *The Navigation Servitude*, Title News, Jan. 1969, at 42; Note, "Effect of the Navigation Servitude on Land Reclamation," 2 Colum. J.L. & Soc. Prob. 75 (1966).

Effect of Navigation Servitude on Waterfront Development

The scope of the servitude, permitting the taking of property without compensatory payment where the regulation of navigation is involved, has been recently interpreted on three occasions by the United States Supreme Court. In *U.S. v. Rands*, 389 U.S. 121 (1967), the Court held that compensation was barred to the owner for the value of riparian rights when fast land is taken by the federal government where that land is adjacent to water deemed navigable. In *Kaiser Aetna v. U.S.*, 444 U.S. 164 (1979), it was held by a divided Court (6–3) that a waterway not previously navigable which is made so by the owner is not covered by the servitude. A like conclusion was reached in *Vaughn v. Vermilion Corp.*, 444 U.S. 206 (1979), wherein a similarly divided Court remanded for further hearings a case involving navigable canals in the Louisiana bayou country to determine whether the developers had destroyed a natural pre-existing navigable waterway.

As so broadly construed by the courts, the servitude constitutes a serious cloud upon many titles to real property in proximity to water. Much fast land which is now a considerable distance from water may well be subject to the navigation servitude depending upon its history and, specifically, upon whether it covers a once-navigable area. Typical illustrations of this problem are found in New York City and downtown Boston. Generally, whenever the navigation servitude might be held applicable by the courts, title companies or attorneys refuse to insure or certify titles without an exception as to the servitude. As a practical matter, some title companies and attorneys will pass titles if they are inland of streets or of other government construction. This practice rests upon the assumption that a taking by the federal government in aid of navigation would be unlikely under such circumstances.

The inability to obtain clear title where the servitude is involved makes it impossible to privately develop areas affected by the servitude because of the lack of a good and marketable title and because of the inability of the developer to finance the project since lenders will refuse to mortgage the property where the title cannot be insured.

As a rule, title to the land underlying navigable water is vested in the state in which the land is located, see 3 *American Law of Property* § 1227B (A.J. Casner ed. 1952), unless it has previously been conveyed to a municipality or to a private upland owner. These areas are impressed with a trust or servitude in favor of the general public of the state in which they are located, requiring them to be used for the purposes of navigation, fishing, commerce and other water uses. The state has the power to alienate rights in such parcels of land, if they "may afford foundation for wharves, piers, docks and other structures in aid of commerce" which "being occupied, do not substantially impair the public use in the lands and water remaining." *Illinois Central R.R. v. Illinois*, 146 U.S. 387, 452 (1892). Although this trust authorizes the states and their political subdivisions to issue regulations controlling the use of these waters, these regulations are subject in all instances to the paramount right of the navigation servitude in the United States.

As a practical matter, however, whenever development of waterfront areas by a state or a municipality is involved, there is little concern for the navigation servitude because most of these developments are financed with government funds and need not satisfy the requirements of private financing or ownership. Thus, one finds that practically all construction involving navigable waters throughout the country has been performed by the government at either federal, state or local levels.

Federal Power Under the Doctrine

Since this supreme federal authority with respect to navigable waters up to the high-water mark is derived from the constitutional power to regulate commerce, it has been held that Congress is authorized to make all laws necessary to control the "navigable waters of the United States," irrespective of who owns the land under water or the riparian rights. See *Silas Mason Co. v. Tax Comm'n*, 302 U.S. 186 (1957); 65 C.J.S. *Navigable Waters* § 10 (1966). Although this control was initially held applicable to tidewaters only, *The Thomas Jefferson*, 25 U.S. (10 Wheat.) 428 (1825), the scope of authority was later expanded to provide that "navigability in fact," irrespective of tide, was the criterion for federal control. See, *e.g.*, *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870); *The Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851). Furthermore, once a waterway is deemed navigable under this definition, federal power extends over its entire course up to the high-water mark even though portions are, in fact, nonnavigable. *U.S. v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899).

The courts have consistently upheld the rights of the federal government under the navigation servitude. See, *e.g.*, *Louisville Bridge Co. v. U.S.*, 242 U.S. 409 (1917); *Greenleaf Johnson Lumber Co. v. Garrison*, 237 U.S. 251 (1915); *U.S. v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913); *Philadelphia Co. v. Stimson*, 223 U.S. 605 (1912); *U.S. v. Bethlehem Steel Co.*, 255 F. Supp. 569 (D. Md. 1964). For example, in *U.S. v. Rands*, 389 U.S. 121 (1967), the Court was asked to decide whether the compensation which the United States is constitutionally required to pay when it condemns riparian land includes the land's value as a port site. The trial court held that compensation was limited to the land's value for sand, gravel and agricultural purposes, and that any special value as a port site could not be considered. The court of appeals reversed, 367 F.2d 186, 193 (9th Cir. 1966), and held that the United States had taken a compensable right of access to navigable waters and remanded for a new trial on the issue of just compensation. Upon further appeal, the Supreme Court, by interpreting the navigation servitude as barring compensation for the ownership of riparian rights, reversed the court of appeals' decision and reinstated the judgment of the district court on the authority of *U.S. v. Twin City Power Co.*, 350 U.S. 222 (1956). Under *Twin City* and cases like it, riparian rights and values are not assertable against the superior rights of the United States, are not property within the meaning of the Fifth Amendment, and need not be paid for when appropriated by the United States. Thus, when only part of a waterfront property is taken and the market value of the remainder is enhanced by reason of improved access to navigable waters, reduction of the award by the amount of the increase in value simply reflects the principle that special values arising from access to navigable waters are allocable to the public, and not to a private interest. Otherwise, the private owner would receive a windfall to which he is not entitled. *U.S. v. Rands*, *supra*, at 126.

Recent Decisions

Recently, the Court seems to be liberalizing its view as to the scope of the servitude, although the conceptual integrity of the doctrine remains intact.

In *Kaiser Aetna v. U.S.*, 444 U.S. 164 (1979), the Court held that a former "fish pond" on the Hawaiian island of Oahu would remain private and restricted, even though the owners, by digging a channel, had made the waters navigable. The body of water at issue, known as Kuapa Pond, was about two feet deep and, since prehistoric times, had been separated from the ocean by a natural barrier beach. In 1961, the area was leased for development and the pond was dredged with a 200-foot wide channel being dug to connect it with Mauna Lua Bay, a tributary of the Pacific Ocean. Since that time, the pond has become the center of a 6,000-acre development called Hawaii Kai, containing a private marina for a large number of boats. The federal government insisted that because the pond had become navigable, the developers were required to permit the public to use it freely.

The district court held that the United States government was correct and that Kuapa Pond now was a navigable waterway. This decision, however, was reversed on appeal and that reversal was then sustained by the United States Supreme Court by a 6–3 vote. The majority opinion was written by Justice Rehnquist, who stated that while the government was "clearly correct" in calling the dredged pond a navigable waterway, this did not mean that "the owner has somehow lost one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others." 444 U.S. at 176. He said that the concept of "navigational servitude" was not a "blanket exception" to the constitutional prohibition against the taking of private property for public use without "just compensation." *Id.* at 172. The opinion continued that ". . . the government's attempt to create a public right of access to the improved pond goes so far beyond ordinary regulation or improvement for navigation as to amount to a taking. . . . In this case, we hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the government cannot take without compensation." *Id.* at 179–80. The dissenters, Justices Blackmun, Brennan, and Marshall, disagreed: "After today's decision, it is open to any developer to claim that private improvements to a waterway navigable in interstate commerce have transformed 'navigable water of the United States' into private property. . . . Such appropriation of navigable water for private use directly injures the freedom of commerce that the navigational servitude is intended to safeguard." *Id.* at 191.

In *Vaughn v. Vermilion Corp.*, 444 U.S. 206 (1979), the Court adhered to the same doctrine but noted that if the developers had destroyed a natural pre-existing navigable waterway in constructing canals, this could create legal ramifications going beyond those involved in *Kaiser Aetna* and that such a case should be studied further before determining that the navigation servitude had no applicability.

Despite such liberalization, the broad scope still given to the navigation servitude by the courts has a pervasive effect on the development of waterfront areas throughout the country. When considered in light of the rapidly accelerating growth of all metropolitan areas, which growth has given rise to urgent need for the creation of new and largely untapped space resources along the waterfront, one can appreciate the increasingly baneful impact of the navigation servitude on real estate development and the necessity for blunting its effect.

Congressional Authority; Declarations of Nonnavigability

Congress has retained control of the exercise by the federal government of its rights under the navigation servitude. The only limitation upon Congressional exercise of the power is that the action be in aid of navigation and that it not be unreasonable. See *U.S. v. Martin*, 177 F.2d 733 (D.C. Cir. 1949). There is no authorization for the executive department, to which Congress has delegated only specific responsibilities in the regulation of navigation, to vary or modify the navigation servitude in any manner. That power is reserved entirely in the Congress.

In the exercise of its power, Congress has, on a number of occasions, passed legislation which has the effect of relinquishing the navigation servitude as to a specific area. This has been accomplished by declarations of Congress to the effect that certain waters are "nonnavigable," thereby removing the incidence of commerce and eliminating the constitutional foundation for the navigation servitude. Of the more than 50 instances where Congress has declared specific waters to be nonnavigable, the right to repeal the declaration has been reserved in more instances than it has not. See 33 U.S.C. §§ 21–59(i), which codify the congressional enactments dating from as early as 1884. Typical language of reservation in a declaration of nonnavigability is as follows: "All that portion of the East River, in the County of Brown, State of Wisconsin, extending from Baird Street, in the City of Green Bay, east and south is declared to be a nonnavigable stream within the meaning of the Constitution and Laws of the United States of America. The right of Congress to alter, amend, or repeal this section is expressly reserved." 49 Stat. 1048 (1935), 33 U.S.C. § 29(a)(1964). Enactments in which there is no reservation are typified in the following provision which refers to the area where the "Waterside" project in Manhattan now stands: "That portion of the East River, in New York County, State of New York, lying between the south line of East Seventeenth Street, extended eastwardly, the United States pierhead line as it existed on July 1, 1965, and the south line of East Thirtieth Street, extended eastwardly, is hereby declared to be not a navigable water of the United States within the meaning of the Constitution and the laws of the United States." 79 Stat. 1094 (1965), 33 U.S.C. § 59(c).

Doubt has been expressed as to whether these declarations of nonnavigability, even where Congress has not reserved the right to repeal the declaration, would effectively relinquish the navigation servitude and thereby require the payment of just compensation upon a taking, particularly where the waters involved are, in fact, navigable. See Model Land Use Code; "The Navigation Servitude," 2 A.B.A. Real Prop., Probate & Trust J. 597 (1967). However, despite these doubts, title companies generally are prepared to insure title without an exception as to the navigation servitude where the congressional declaration of nonnavigability omits the reservation of a right to repeal. Until tested in the courts, this method will continue to permit some waterfront development, albeit highly limited, since few developers are able to thread their way through the extensive congressional labyrinth to obtain an enactment relating to their specific property.

Further Limitations on Private Development

Congress also has the power, derived from the authority to regulate commerce upon navigable waters, to establish harbor lines and otherwise regulate the use of navigable waters, including the establishment of limitations on the right of an owner to build wharves, piers, docks or other structures beyond established harbor lines. See, *e.g.*, *Seattle v. Oregon & Washington R.R.*, 255 U.S. 56 (1921); *Greenleaf Johnson Lumber Co. v. Garrison*, 237 U.S. 251 (1915); *Philadelphia Co. v. Stimson*, 223 U.S. 605 (1912); *Union Bridge Co. v. U.S.*, 204 U.S. 364 (1907); *Scranton v. Wheeler*, 179 U.S. 141 (1900); *Gibson v. U.S.*, 166 U.S. 269 (1897). This power to establish harbor lines has been delegated by Congress to the Secretary of the Army, subject, of course, to the invariably supervening effect of the navigation servitude.

As of now, the Secretary of the Army, acting through the U.S. Army Corps of Engineers, has jurisdiction and control over all navigable waters of the United States. These controls are set forth in the federal regulations. See 33 C.F.R. § 209.150

(1970); Reg. No. 1145-2-304, 35 Fed. Reg. 8280 (1970); 30 Stat. 1151 (1899), 33 U.S.C. § 403 (1964); Dep't of Army, Office of the Chief of Engineers, Reg. No. 1145-2-203, ¶ 6(a). Cf. *Zabell v. Tabb*, 430 F.2d 199 (5th Cir. 1970); National Environmental Policy Act of 1969, 33 C.F.R. ¶ 209-120(d)(1) (1970); Dep't of Army, Office of the Chief of Engineers, Reg. No. 1145-2-303, ¶ 2(c).

Under these regulations, the bed of a navigable waterway ordinarily is deemed to extend to the high water mark. However, all of the area up to the high water mark may not be navigable in fact, and it may be necessary to utilize part of the area for wharves, piers, docks and other structures in order to reach the part which is actually navigable. Consequently, the Secretary of the Army has been authorized to permit filling and the erection of wharves, piers and other structures in navigable waters when the project is recommended by the Chief of Engineers. The Secretary is likewise authorized to establish "harbor lines," and when a harbor line has been established, a permit to erect wharves, piers and other improvements is required only if they are on the water side of the harbor line.

But the permits granted by the Secretary for obstructions in waters where no harbor line has been established, or beyond the harbor line when one has been established, are expressly made subject to revocation. Moreover, the power of the Secretary to re-establish a harbor line and to require the removal of obstructions erected on the shore side of the former line without payment of compensation for the value of the improvements, or for the damage resulting from the removal thereof, has been expressly recognized by the U.S. Supreme Court. *Greenleaf-Johnson Lumber Co. v. Garrison*, 237 U.S. 251 (1915). Consequently, any improvement made by the owner of land underlying navigable water, regardless of whether or not made pursuant to a permit issued by the Secretary of the Army and even if made within an established harbor line, may be subject to removal without compensation to the owner if, in the judgment of the Secretary of the Army, it constitutes an obstruction.

The state in whose jurisdiction the waters lie is likewise authorized to prescribe limitations on the use of navigable waters. In fact, the state system of tidewater licensing predates the system of federal controls, which did not start until 1886. These provisions vary from state to state and, consequently, require checking before use may be made of any area within federally established harbor lines. In many jurisdictions, the state has delegated regulatory authority to the municipality appurtenant to navigable waters, and municipal regulations must therefore likewise be carefully checked to determine the limitations on available uses. In any case, as already stated, it must always be borne in mind that the federal power under the navigation servitude supersedes local regulatory provisions.

Conclusion

The shorefront represents a new frontier for our congested cities and urban areas faced with a shortage of property available for real estate development. The shorefront also usually offers a resource for new construction involving no relocation or demolition of existing facilities. Moreover, our great American ports, *e.g.*, Manhattan and Boston, have been described as unsuitable for cargo operations due to technological developments in that field resulting from the extensive and increasing use of containers in the shipping field. The combination of these factors leads inexorably to a situation where the development of the waterfront, with housing, business and industrial uses not connected with port facilities, is inevitable.

As a result of this ground swell of opposition against the navigation servitude and the obstacles to development which it presents, various organizations are taking steps to permit the federal government to relinquish or modify its rights under the navigation servitude. This, of course, can only be accomplished by federal legislation setting up an administrative procedure which would serve as an alternative to the present unsatisfactory method of a Congressional declaration of nonnavigability of a particular area.

The Senate Committee on Public Works has recommended that an Advisory Committee to study the problem be made part of the next Rivers and Harbors Bill enacted by the Congress. This Advisory Committee should consist of representatives of the federal Departments of the Army, Justice, Housing and Urban Development, Commerce, Interior, and

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Transportation, as well as a representative of the President's Council on Environmental Quality and several public members. Advisory Committee findings would be reported back to the Congress to become the basis for such congressional action as may be deemed necessary.

To argue that the practical proposals which have been discussed conflict with the U.S. Constitution and the power of the federal government to act in an unlimited manner with respect to the navigation servitude is to accept without question the judicial doctrine of the navigation servitude. Although the servitude has been repeatedly sustained by the U.S. Supreme Court, this does not alter the fact that in today's world there is a pressing need for reexamination of the doctrine in light of its debilitating effect upon the utilization of our waterfront areas in a manner consistent with the developing requirements of a modern urban society.

(*Editor's Note:* Waterfront development and revitalization are the focus of a 108-page book recently published by the U.S. Department of Commerce's National Oceanic and Atmospheric Administration, entitled *Improving Your Waterfront: A Practical Guide.* The book, containing numerous photographs and case studies, as well as discussions of issues and regulatory techniques, is available in single copies, at no charge, from the Office of Coastal Zone Management, 3300 Whitehaven St., N.W., Washington, D.C. 20235.)

PENNSYLVANIA CONFERENCE OF TEAMSTERS
AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA.
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AUGUST 16, 1988

Honorable Quentin Burdick
Chairman
Committee on Environment
and Public Works
SD-458
Dirksen Senate Office Building
Washington, D.C., 20510

Honorable Robert Stafford
Ranking Minority
Committee on Environment
and Public Works
SD-458
Dirksen Senate Office Building
Washington, D.C., 20510

Dear Senators Burdick and Stafford:

Please be advised that the Pennsylvania Conference of Teamsters representing over 140,000 workers in the Pennsylvania, New Jersey, Delaware and West Virginia area opposes the proposed removal of Navigational Servitude from various properties located along the Delaware River in Philadelphia, Pennsylvania, which your Committee currently has under consideration.

We recently discovered these proposals through an announcement of support by Senator Arlen Specter seen on the Philadelphia local news stations. We have expressed our strong opposition to these proposals to Senator Specter.

Our main concern is the loss of industrial and port jobs on the Delaware River. A good portion of our waterfront area has already been gobbled up by real estate developers and potential sites for ports, warehouses, factories and other port related facilites were lost to hotels, restaurants, marinas and other "recreational" type facilities. The City of Philadelphia is losing steady, full-time employment opportunities because of these real estate developers trying to make a quick dollar.

We are totally and unequivocally opposed to all aspects of these proposals. It is our position that no aid or assistance should be given to any real estate developers to make money on land that should be developed to expand our port economy and waterfront. We are putting millions of dollars into tearing down piers, warehouses, and industrial plants that once employed thousands of tax-paying workers and constructing hotels, restaurants, shopping centers and other establishments that employ only part-time help at minimum wages.

Maryland and Virginia are pumping millions and millions of dollars into their ports to attract commerce and gain employment. Here we are knocking down facilities that could employ full time workers at decent wage rates and replacing them with an entertainment center. We are losing the

Honorable Quentin Burdick
Honorable Robert Stafford
August 16, 1988
Page #2

industrial base of our city and granting this request for Navigational Servitude would only hasten and assist in a loss of full-time employment and decent wages and benefits for our citizens.

We cannot write-off these piers because the Philadelphia Industrial Development Corporation wants to take the easy way out and parcel this land out to real estate developers who only want to make a quick buck. We feel that the federal government, as well as any and all city and state agencies, should not sell out the workers of Philadelphia by taking the easy way out. We urge you to develop programs to entice shippers, pier operators, storage and distribution centers to take advantage of the Philadelphia ports. Philadelphia in an overnight drive can reach over one-half the population of our country. What an ideal location for an import/export center and distribution center! Instead of promoting the positive aspects of our ports and aggressively pursuing good, full-time jobs for our port, sadly, we only see an emphasis being put on the port as a recreational or entertainment center.

The economic future of Philadelphia depends on what is done with our ports today. We cannot let the commerce aspects of our ports slowly fade away and all that we will have is entertainment centers that employ only part-time workers with little or no benefits.

We urge you to reject the proposed removal of Navigational Servitude from the named properties before you and urge the Philadelphia Port Corporation, the Philadelphia Industrial Development Corporation, and any other interested parties to devote as much time and energy in planning to develop the port as a port as they currently are dealing with real estate developers in quick buck schemes.

Please call our office if you need any further information on the above.

Very truly yours,

John P. Morris
President
Pennsylvania Conference
of Teamsters

JPM/jes

Jack Sparks, *President*
George G. Macintire, *Secretary Treasurer*
Richard G. Steers, *Manager*
Edward L. Colaprete, *Business Agent*

The Pilots' Association
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Bay & River Delaware
214 South Eleventh Street
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FAX (215) 922-7411

August 19, 1988

The Honorable Quentin Burdick
Chairman
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Dirksen Senate Office Building
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Washington, DC 20510

The Honorable Robert Stafford
Ranking Minority
Committee on Environment and
Public Works
Dirksen Senate Office Building
SD-458
Washington, DC 20510

Dear Senators Burdick and Stafford:

It has come to my attention that your committee is considering removing the navigational servitude from various properties along the Delaware River in Philadelphia, Pennsylvania.

The Pilots' Association for the Bay and River Delaware must strongly go on record in opposition to this proposal. The construction of condominiums and small boat marinas, within a close proximity of the main navigational channel on the Delaware River in the Philadelphia area, would create a potential hazardous condition. With the size of vessels transiting this area reaching a length of 900 feet and 100,000 dead weight tons, you can understand our deep concern regarding a potential marine disaster.

Finally, the economic impact caused by any restrictions on navigating the subject area due to this potential hazard could be quite devastating on the Delaware Valley.

I appreciate your serious consideration in this matter.

Sincerely,

Jack Sparks

Jack Sparks
President

cc: The Honorable Arlen Spector, U. S. Senate
The Honorable John Heinz, U. S. Senate
The Honorable G. Davis Greene, Treasurer, Commonwealth of Pennsylvania
The Honorable W. Wilson Goode, Mayor, City of Philadelphia
Mr. Wallace Nunn, Chairman, Philadelphia Port Corporation
Mr. Joseph Egan, President, PIDC
Reverend Nicholas Rashford, S. J., Chairman, DRPA
Board of Directors: Philadelphia Maritime Exchange

JS:dfs

Ports of Philadelphia MARITIME EXCHANGE

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August 8, 1988

The Honorable Quentin Burdick
Chairman
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Washington, DC 20510

The Honorable Robert Stafford
Ranking Minority
Committee on Environment
and Public Works
Dirksen Senate Office Bldg.
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Washington, DC 20510

Dear Messrs. Burdick and Stafford:

We are writing regarding the proposed removal of Navigational Servitude from various properties located along the Delaware River in Philadelphia, Pennsylvania, and which your Committee currently has under consideration. The Ports of Philadelphia Maritime Exchange is a non-profit trade association which represents 200 businesses associated with the maritime industry on the Delaware River. The Exchange, in existence since 1875, is committed to protecting and maintaining the competitive position of the Ports of Philadelphia.

We were first made aware of the City of Philadelphia's request of Congress to remove Navigational Servitude only several weeks ago. We would ask that the Committee postpone any action on this measure until there is a better understanding of its proposed impact on the issue of port operation and port development on the Delaware River.

The Committee should also be aware that there is considerable debate occurring in our region regarding the future course of the Delaware River Ports. In April of this year, Governors Casey, Castle and Kean held a historic meeting to discuss ways in which the states of Pennsylvania, Delaware and New Jersey might cooperate to better address issues of mutual concern to the future growth and development of the Delaware River ports. I have attached for the Committee's consideration a copy of the statement the Governors released regarding this meeting. As you can see, one area the Governors are exploring addresses the issue of channel dredging and maintenance.

Additionally, the Committee should be aware that in February of this year Mayor Goode of Philadelphia requested the Commonwealth of Pennsylvania to assume control over city-owned docks and port facilities. In response to the Mayor, Governor Casey appointed a special committee to recommend to him a plan of action to accommodate the Mayor's request. This plan was submitted to the Governor several weeks ago. Since then, the Governor has appointed State Treasurer Davis Greene to serve as the interface in order to accomplish the transfer of port facilities from the city to the state.

These actions, coupled with the uncertainty of the potential impact of the removal of Navigational Servitude from various properties along the Delaware River, lead us to conclude that further discussion is necessary and desirable. These discussions should involve the port community at the local level, and they should occur prior to any Congressional action. We do not wish to stand in the way of the City's progress relevant to the commercial development of the waterfront. However, we want to insure that the Ports of Philadelphia will not be adversely impacted by these decisions.

So as not to impede the City's progress we have written the appropriate officials in this matter and have requested that they meet with us. It would be our intention to gain a more specific understanding of the City's plans so that we might arrive at a position on this matter. Please be assured that we will continue to keep the Committee informed of our discussions with City officials and will report back to you as soon as we arrive at a final position. If we can provide you with any additional information on this matter, please do not hesitate to contact us.

Sincerely

H F Corry

Henry F. Corry
President

cc: The Honorable Arlen Spector, U. S. Senate
The Honorable John Heinz, U. S. Senate
The Honorable G. Davis Greene, Treasurer, Commonwealth of PA
The Honorable W. Wilson Goode, Mayor, City of Phila.
Mr. Wallace Nunn, Chairman, Phila. Port Corp.
Mr. Joseph Egan, President, PIDC
Rev. Nicholas Rashford, S.J., Chairman, DRPA
Board of Directors -
Ports of Philadelphia Maritime Exchange

GOVERNORS' SUMMIT

April 4, 1988

Joint Statement by the Governors of Delaware, New Jersey and Pennsylvania

The preeminent unifying force in the greater Delaware Valley region is the Delaware River itself. The river is an avenue of commerce unmatched on the eastern coast of the United States. It is also an environmental treasure, whose beauty and continued vitality uplifts and enriches the people of Delaware, New Jersey and Pennsylvania.

Approximately 30 million people live within a hundred mile radius of the Delaware River ports. More than half the nation's industry is within overnight shipping distance. The Delaware River ports are strategically located in the center of one of the largest consumer markets in the entire world.

The challenge facing the states of Delaware, New Jersey and Pennsylvania is to preserve the magnificent beauty of the Delaware River and Bay and ensure that the full economic potential of this great river and bay can be realized. The manner in which we collectively meet this challenge and balance these competing environmental and economic interests is fundamental to the future of our three states and the Delaware Valley region.

First, we must recognize that this challenge cannot be met overnight, nor without long-term planning and cooperation among our states. This meeting represents an important beginning, the first step towards identifying common ground that can serve as a basis for future cooperative action.

We are mindful of past efforts at comprehensive regional development along the Delaware River. Recognizing that in some instances these efforts did not succeed because they sought to do too much, too quickly, or could not overcome the strong tides of parochialism and competing special interests, we have agreed to think creatively about the long-term possibilities for regional cooperation, but to move deliberately and prudently.

Today, we begin a new effort -- founded on realistic expectations -- to strike a balance among the competing and legitimate interests among the Delaware River and Bay Community. We embark on this new path as working partners with a shared concern for the region as a whole and interest in the role the Delaware River and Bay can play in the economic development of each of our individual states. While each state reserves the right to disagree and, if necessary, disengage from this discussion, we also believe there is reason for optimism about the prospect for long-term regional cooperation.

Our three states share an unyielding commitment to preserve the river and its precious environmental resources. Each state has taken action to protect the fragile nature of the region's waterway and estuaries, but recognizes that more can and must be done to preserve the river for future generations. Our legacy should be a cleaner, more vibrant Delaware River and Bay.

We also agree that the opportunities for economic and commercial development of this 135-mile waterway are great. The importance of the Delaware River to the growth of international trade in our region -- and to the prosperity of our regional maritime industry -- is irrefutable. The realization of that potential is central not only to the maritime industry, but also to our businesses and industries which rely on international markets and suppliers. Although the benefits of such development will be felt most dramatically here, they can reach far beyond the Delaware Valley Region to stimulate economic growth and new jobs across each state.

Identifying a shared vision of what the river can mean for our three states is easier than agreeing on what we can do now to start to make that vision a reality. Our efforts to fashion a comprehensive, long-range development plan for the region present one of the most complicated undertakings of its kind in the nation.

Because of the peculiar three-state nature of the Delaware River and Bay Community, we must begin by working with the existing regional and bi-state public agencies and authorities. While we have no illusions about the difficulty in coordinating the efforts of a myriad of agencies and authorities, we believe that given the proper direction, they can play a critical role in developing a planning and communications network that can provide the basis for more significant cooperation in the future. By beginning to give that direction, we hope that this meeting will serve as a catalyst for the many interests on the river to arrive at mutually agreeable changes that will benefit the people and the economy of the entire region.

Within this framework, we propose to focus on areas of common interest which can be explored now and longer term initiatives which will enhance the region's economic viability and quality of life. In broad terms we have agreed to explore the following areas of potential cooperation among our states:

- Development of an appropriate mechanism to undertake projects designed to stimulate economic growth and produce new jobs for the region consistent with the high environmental standards set forth in this statement;
- Coordination of all programs to maintain and, if deemed commercially desirable and environmentally acceptable, to increase the depth of the river's channel;
- Cooperation in planning and assessment of all the transportation links along the Delaware River and Bay;
- Cooperation in the assessment, development and implementation of appropriate cargo movement technology, including computerized telecommunications systems;
- Joint formulation of a strategic development plan which will guide resource allocation into the next century;
- Coordination among the three states' Washington, D.C., representatives in order to maximize the region's ability to influence the flow of federal dollars and other assistance for port and channel development.

We believe that collaboration among our three states in these areas offers a strong basis for future cooperative effort. Each area potentially provides an opportunity for our states to accomplish more working collectively than can be achieved through each state's individual effort.

The overriding need, however, is for the development of a comprehensive plan for the Delaware River and Bay region. Comprehensive planning must begin with an assessment of the real potential for future economic growth of the Delaware Valley region.

Finally, we recognize that as our cooperative efforts begin to have an impact on the region, it may be appropriate to redraft or amend the various compacts currently governing our states' relationships in managing the Delaware River and its ports.

We believe we have established a practical agenda embodying realistic expectations. Our meeting today has been frank and constructive. We expect to continue these discussions. We have within our means the ability to make concrete changes in the Delaware River and Bay Region which can benefit the people of all three states. Working together we will fully explore all the possible avenues available for revitalizing the region.

Michael N. Castle
Governor of Delaware

Thomas H. Kean
Governor of New Jersey

Robert P. Casey
Governor of Pennsylvania

Ports of Philadelphia MARITIME EXCHANGE

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JAMES F. YOUNG, ESQ. SOLICITOR

August 8, 1988

The Honorable W. Wilson Goode, Mayor
City of Philadelphia
City Hall
Philadelphia, PA 19107

Dear Mayor Goode:

I have enclosed a copy of the letter that was sent to the U.S. Senate Environment and Public Works Committee regarding the issue of removing Navigational Servitude for various properties within the City of Philadelphia. As you are aware, this organization is vitally concerned with future port development on the Delaware River.

We are supportive of policy decisions that identify new and productive uses for waterfront property that are no longer suitable for port development. However, we are concerned that the action that the City is asking the Congress to take may well hamper future port development opportunities on the Delaware River.

Specifically, we understand that many of the proposed projects on the affected properties will involve the construction of pleasure boat marinas to compliment land side development. Our concern is that there has not been sufficient consideration given to the potential impact of pleasure boat traffic as it relates to the main navigational channel of the Delaware River. The Delaware River is unique in many ways. It is particularly unique in that the main shipping channel is located in close proximity to the adjacent shoreline.

Before this organization would lend its support to efforts to relieve the federal government of navigational servitude, we would require assurances that the proposed development will not negatively impact either future port development or impede the ability of ships to safely transit the river.

We would like to resolve this issue in an expedient manner. Therefore, we suggest that a meeting be arranged to discuss the particulars of this issue. We are hopeful that there will more specific information that will enable us to be supportive of the City's position.

Sincerely,

H F Corry

Henry F. Corry
President

Enclosure

PORTS OF PHILADELPHIA
MARITIME SOCIETY

President, FRANCIS X. SCANLAN .... Scanlan & Scanlan, P. C.
2900 Two Mellon Bank Center, Philadelphia, PA 19102, 564-6399

Vice President, CAPTAIN JACK SPARKS .... Pilots' Association for
the Bay and River Delaware
214 South 11th Street, Philadelphia, PA 19107, 922-7165

Secretary, PATRICK T. DOLAN .... Philadelphia Marine Trade Association
600 Lafayette Bldg., Philadelphia, PA 19106, 922-7510

Treasurer, WILLIAM A. HARRISON .... Ports of Philadelphia Maritime Exchange
913 Lafayette Bldg., Philadelphia, PA 19106, 925-1522

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Special Finance
Lawrence Giglio

September 30, 1988

The Honorable Quentin Burdick
Chairman
Committee on Environment and
Public Works
Dirksen Senate Office Building
SD-458
Washington, DC 20510

- and -

The Honorable Robert Stafford
Ranking Minority
Committee on Environment and
Public Works
Dirksen Senate Office Building
SD-458
Washington, DC 20510

Dear Senators Burdick and Stafford:

The Ports of Philadelphia Maritime Society is a non-profit association which has 425 members. Our goals are to advance and encourage the development of the Ports of Philadelphia. I am writing to you on behalf of our membership to request that you take into consideration the safety factors referred to below in connection with any relinquishment of navigational servitude along the Delaware River.

PAGE NO. Two TO The Honorable Quentin Burdick
The Honorable Robert Stafford

We are concerned that the proposed commercial development of the waterfront, which includes the building of a plethora of small boat marinas, will create a navigational nightmare on the Delaware River. Specifically, the commercial development will be located only 100 feet from the main navigational channel of the Delaware River.

The close proximity of the channel to the marinas, coupled with the increase in small boat traffic is certain to create a navigational safety hazard. Large ships currently navigating the river create a suction and surge dynamic which may also affect not only the smaller boats but adjacent facilities as well.

Additionally, small pleasure boaters are not required to be licensed or experienced prior to operating their boats. Many times they are unfamiliar with the "rules of the road". National statistics indicate a significant increase in incidents involving small boaters. While we are fearful that the proposed commercial development may negatively impact commercial shipping, we are just as concerned with the potential loss of human life.

We hope that you will give our views on this issue careful consideration. If we can provide any additional information, please don't hesitate to contact us.

Sincerely,

Francis X Scanlan

Francis X. Scanlan
President

FXS/dlb

cc: The Honorable H. John Heinz, III, U. S. Senate
The Honorable Arlen Specter, U. S. Senate

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

August 12, 1988

TO : Senate Committee on Environment and Public Works
Attention: Mark Haines

FROM : American Law Division

SUBJECT : Legal Effect of Congressional Declarations of Non-navigability, Particularly with Respect to the Navigation Servitude

You have asked whether, as a general matter, a statutory declaration that a body of water is non-navigable imposes any legal restraint on subsequent actions of the United States -- in particular, whether such a declaration affects the ability of the United States to later assert its navigation servitude over that body of water.

Background

On over 60 occasions, dating back to 1894, Congress has statutorily declared that a specified portion of a waterway is "unnavigable," "nonnavigable," or "not a navigable water."[1] Even a quick reading of these statutes reveals that no one purpose underlies them. Most state broadly that the waterway is declared nonnavigable "within the meaning of the Constitution and laws of the United States," or simply "within the laws of the United States." Others state more narrowly that the declaration is for the purpose of "laws enacted by the Congress for the preservation and protection" of navigable waters of the United States. Still others assert that statutory navigability is limited to a single program statute, the General Bridge Act,[2] or solely "for purposes of the navigation servitude."[3] In addition to such express mentions of the navigation servitude, legislative history indicates that many of the more generally phrased declarations were designed to signal that the servitude would not be exercised.[4]

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[1] 33 U.S.C. §§ 21-59w. The phrases in the text are assumed to be legally fungible.

[2] 33 U.S.C. §§ 59e-1, 59u.

The navigation servitude, judicially derived from the constitutional commerce power,[5] permits the United States to use, regulate, or compel the removal of obstructions in navigable waters in the interest of navigation -- without liability for takings.[6] The power may even allow the United States to take such actions without compensation as to lands which, through natural accretion or artificial fill, now occupy the site of waters once navigable.[7] Hence, the servitude may constitute a cloud on title to real property located near, as well as under, water. Title insurance companies reportedly list the servitude as a title exception, with the result that lenders will not make loans on property subject to the servitude and title to such property may be

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[3] 33 U.S.C. §§ 59v(a), 59w.

[4] See, e.g., H.R. Rep. No. 973, 89th Cong., 1st Sess. 237 (1965), accompanying Pub. Law 89-298, 33 U.S.C. § 59c; and H.R. Rep. No. 1167, 90th Cong., 2d Sess. 2 (1968), accompanying Pub. Law 90-312, 33 U.S.C. § 59f.

[5] U.S. Const. art. I, § 8, cl. 3.

[6] The rule of no compensation derives from the fact that property damage from government dams, channel dredging, or other assertions of the servitude "results not from a taking of the riparaian owner's property in the stream bed, but from the lawful exercise of a power to which the property has always been subject." United States v. Chicago Rd. Co., 312 U.S. 592, 597 (1941).

[7] The text principle flows from the doctrine that a waterway once legally navigable for commerce-power purposes retains that characteristic for all time. Economy Light Co. v. United States, 256 U.S. 113, 123 (1921); United States v. Appalachian Power Co., 311 U.S. 377, 408 (1940).

unmarketable.[8] Aware of the problem, Congress has enacted the aforementioned legislation declaring that specified segments of rivers and ports are to be deemed nonnavigable, though in many cases reserving a right to "alter, amend, or repeal" the declaration.

Effect of Nonnavigability Declaration

There are no reported cases construing the non-navigability provisions in the U.S. Code, and time precludes our reviewing the legislative history of each and every such provision. Hence we cannot state the precise range of effects such declarations were intended to have. At first blush, one might want to ask whether the navigability or non-navigability of a waterway affects the applicability of (1) regulatory statutes whose reach is defined by "navigable waters of the United States," (2) the navigation servitude, (3) the rule governing federal versus state title to submerged lands, and (4) the admiralty jurisdiction of Article III federal courts. We omit analysis of any possible implications for submerged lands title[9] or federal admiralty jurisdiction,[10] applications (3) and (4), since our preliminary survey suggests that the principal if not exclusive aims of non-navigability declarations fall under applications (1) and (2).

The extent to which nonnavigability statutes limit navigability-based

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[8] Statement of Eugene Morris, Special Comm. on Federal Navigation Servitude, American Bar Ass'n, during hearings before Senate Subcomm. on Flood Control on Omnibus Water Resources Development bill, 91st Cong., 2d Sess. 188 (May 12, 1970).

[9] "Navigability" is a central factor in determining whether the federal government or a new state holds title to submerged lands at the time of being admitted to statehood. Utah v. United States, 107 S. Ct. 2318 (1987).

[10] Among other things, this jurisdiction extends to suits for physical damage to ships or cargoes on "navigable" waters. See generally Gilmore and Black, The Law of Admiralty 23 (2d ed. 1976).

federal statutes, application (1) above, is an easy issue only where the reach of the nonnavigability provision is spelled out in statutory text or legislative history. Illustrative are the two declarations of nonnavigability in the U.S. Code stated facially to be "for purposes of the General Bridge Act."[11] In the far more numerous group of cases where no such indicia of breadth are provided, a court no doubt would try to divine the congressional purpose from whatever sources it could, and limit the impact of statutory nonnavigability accordingly. It is hard to imagine, for example, that a court would accept an unexplicated nonnavigability declaration as excusing compliance in the affected waterway segment with Clean Water Act effluent limits, despite the limitation of that act to "navigable waters." The language of many declarations suggests instead that the only "application (1)" intended was to dispense with Corps of Engineers or Coast Guard preauthorization of waterway development projects.[12]

To whatever extent a non-navigability declaration shrinks the reach of regulatory statutes, there seems to be no legal impediment to Congress' later reinstating navigability and restoring the original regulatory breadth. There is no vested right in the continuation of a given rule of law.[13] Neither could a constitutional taking claim be grounded on the mere fact that capital outlays in the affected area were made on the expectation of an absence of federal regulation. The Supreme Court has made clear that ripeness considerations preclude adjudication of taking claims based simply on a government claim of regulatory jurisdiction over an area.[14] Rather, it is only when such jurisdiction is exercised, as by Congress' actually invoking the servitude, that the taking issue is ripe.

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[11] Note 2 supra.

[12] Section 9 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 401, makes it unlawful to construct "any bridge, causeway, dam, or dike over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States" until congressional consent has been obtained and until the plans for the bridge or causeway have been approved by the Secretary of Transportation, or the plans for the dam or dike have been approved by the Corps of Engineers.

Section 10 of the same act, 33 U.S.C. § 403, makes it unlawful to build "any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty or other structures" or to "excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of" in any navigable water of the United States without Corps preauthorization. An overlapping requirement in section 404 of the Clean Water Act, 33 U.S.C. § 1344, authorizes the Corps to issue permits "for the discharge of dredged or fill material into the navigable waters ...."

Application (2) above, the effect of statutory non-navigability on exercises of the navigation servitude, must be analyzed separately as to the executive and legislative branches. As to the executive branch, it would seem that while a non-navigability declaration is in effect agencies are barred from invoking the servitude. Thus no issues as to the effects of asserting the servitude subsequent to a congressional declaration can arise.[15]

Far more complex questions arise when one asks what effect a non-navigability declaration has on later congressional options. Is Congress free (with or without expressly reinstating navigability) to exercise the navigation servitude in an area formerly declared non-navigable for the purpose of removing the applicability of the servitude? This seems to be a question of first impression, no doubt because Congress appears never to have attempted the exercise of the servitude under such circumstances. As the following will show, however, court decisions involving analogous attempts by the Corps of Engineers, plus Supreme Court taking decisions, suggest that taking considerations may constrain federal reassertion of the servitude -- as to transactions and property rights consummated while a non-navigability declaration is in effect.

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[13] Munn v. Illinois, 94 U.S. 113, 134 (1876); Chicago v. Alton R.R. v. Tranbarger, 238 U.S. 67 (1915); New York Central R.R. Co. v. White, 243 U.S. 188 (1917).

[14] United States v. Riverside Bayview Homes, Inc., 106 S. Ct. 455 (1985).

[15] But see four enactments where Congress made the nonnavigability declaration conditional on the Corps of Engineers' finding that the proposed waterway project is "in the public interest," based on engineering and environmental studies. 33 U.S.C. §§ 59c-2, 59k, 59n, and 59o.

As a threshold matter, we take the navigation servitude to be more in the nature of a sovereign power than a traditional property interest. Granted, the federal ability to regulate navigable waters in the interest of navigation and without compensation is described by the Supreme Court in some very property-like terms: it is variously called a "navigational servitude,"[16] a "dominant servitude,"[17] or a "superior navigation easement."[18] "Servitudes" and "easements," of course, are generally deemed to be property interests. Notwithstanding, leading navigation-servitude decisions of the Supreme Court reveal no use of the description "property" in connection with the servitude. Rather, it is labelled a "privilege,"[19] a "paramount right,"[20] or a "dominant power."[21] Moreover, one decision states flat out that the navigation servitude is not a property right of the United States:

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[16] Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

[17] Federal Power Comm'n v. Niagara Mohawk Power Corp., 347 U.S. 239, 249 (1954).

[18] United States v. Grand River Dam Auth., 363 U.S. 229, 231 (1960); Choctaw Nation v. Oklahoma, 397 U.S. 620, 636 (1970).

[19] United States v. Virginia Elec. Co., 365 U.S. 624, 627-629 (1961).

[20] Federal Power Comm'n v. Niagara Mohawk Power Corp., 347 U.S. 239, 251 (1954).

[21] United States v. Twin City Power Co., 350 U.S. 222, 224 (1956).

> The interest of the United States in the flow of a navigable stream originates in the Commerce Clause. That clause speaks in terms of power, not of property.[22]

Assuming, as appears warranted, that the navigation servitude is a sovereign power, the next question is whether it is one that may be temporarily or irreversibly alienated. Supreme Court decisions on the alienability of sovereign powers yield opposite conclusions depending on the power involved: state and local police powers are deemed nonalienable,[23] powers in the realm of taxation and economic relations are held divestible.[24] Making no mention of such prior law, navigation servitude cases assert that the servitude can be "surrendered" or "waived" or "compromised away"[25] -- and in two cases, discussed below, the United States was actually held to have done so. The more recent cases insist on a clear and unequivocal expression of congressional intent before finding the servitude relinquished.[26] Alienation of the servitude may be achieved, say the cases additionally, by either Congress or an agency to which the power to do so has been delegated.[27]

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[22] Id.

[23] In the leading case, Stone v. Mississippi, 101 U.S. 814 (1880), the state chartered a company to which it expressly granted the power to conduct a lottery. In upholding an act three years later prohibiting lotteries, the Supreme Court said: "The power of governing is a trust committed by the people to the government, no part of which can be granted away."

[24] See generally Congressional Research Service, The Constitution of the United States: Analysis and Interpretation 416-418 (Sen. Doc. 99-16, 1987).

[25] In reverse chronological order, the cases dealing with waivers of the navigation servitude are: Lambert Gravel Co., Inc. v. J.A. Jones Construction Co., 835 F.2d 1105, 1109-1111 (5th Cir. 1988) (congressional intent to waive navigation servitude over lock and dam project not sufficiently clear); United States v. Cherokee Nation of Oklahoma, 107 S. Ct. 1487 (1987) (no evidence that United States intended through treaty to waive servitude as to river segment under Indian sovereignty); United States v. 119.67 Acres of Land, 663 F.2d 1328 (5th Cir. 1981) (summarized in text); Coastal Petroleum Co. v. United States, 524 F.2d 1206, 1210 (Ct. Cl. 1976) (no indication that Congress intended to waive servitude with respect to levee project); United States v. Stoeco Homes, Inc., 498 F.2d 597 (3d Cir. 1974) (summarized in text); Federal Power Comm'n v. Niagara Mohawk Power Corp., 347 U.S. 239, 254-255 (1954) (Federal Power Act shows no intent to assert servitude, but rather to require that licensees under act compensate for destruction of riparian rights); United States v. Gerlach Live Stock Co., 339 U.S. 725, 739 (1950) (by authorizing dam as reclamation rather than navigation project, Congress disempowered federal agency from later asserting servitude in connection with project).

Two of the servitude-alienation cases are of particular relevance to this memorandum, in that they deal with Corps of Engineers efforts to reassert the servitude following Corps actions seen to waive it. In United States v. Stoeco Homes, Inc.,[28] the court addressed a Corps policy of exempting from permit requirements all waterway development within pierhead lines, a policy it abandoned in 1970. Finding the pre-1970 policy to be a "surrender of the federal servitude" by the Corps, the court refused to prohibit construction without a permit on wetland lawfully filled in under the pre-1970 policy. The court stressed that "though the Congressional power over the regulation of commerce is far reaching that power is limited by the due process and taking clauses of the fifth amendment."[29] In a kindred case, United States v. 119.67 Acres of Land,[30] the court held that where a Corps condemnation action is resolved by a stipulated agreement as to the amount of compensation, properly authorized and entered as a judgment of the court, the Corps may not later seek judicial modification of the agreement by asserting the navigation servitude. The court repeated the above Stoeco quote regarding due process and taking limits on the commerce power, and admonished that the government "must keep its word."

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[26] See, e.g., United States v. Cherokee Nation of Oklahoma, 107 S. Ct. 1487, 1492 (1987).

[27] United States v. 119.67 Acres of Land, 663 F.2d 1328, 1335 (5th Cir. 1981); United States v. Stoeco Homes, Inc., 498 F.2d 597, 610 (3d Cir. 1974).

[28] 498 F.2d 597 (3d Cir. 1974).

[29] Id. at 611.

[30] 663 F.2d 1328 (5th Cir. 1981)

It is admittedly precarious analogizing from Corps of Engineers cases to issues of congressional power, particularly since the constitutional reference in the Corps cases is given only passing mention. For whatever guidance these decisions provide, however, it seems that the navigation servitude may indeed be permanently surrendered by Congress, or (perhaps more likely) may be in effect non-assertible following a non-navigability declaration owing to compensation required under the taking clause.[31] Critically, however, this conclusion has its bounds. Both cases rejecting government attempts to assert a previously surrendered servitude involved past transactions or already vested property rights -- instances where reasonable and settled expectations of private parties would be upset.[32] In contrast, there is no support in the cases for the United States' being disabled from reinstating the servitude over a given area with respect to transactions or property rights arising subsequent to such reinstatement. In these circumstances, where no due process, taking, or other impediments appear implicated, the nature of the servitude as a sovereign power under the commerce clause seems to demand that its legislative "surrender" be reversible.[33]

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[31] Given the practice of recent decades, the Supreme Court would be more likely to express discomfort over the impact of congressional reversals here in taking-clause rather than due process terms.

[32] "There must come a point at which citizens can depend upon the promises of the United States with regard to their own and the Government's property rights." United States v. 119.67 Acres of Land, 663 F.2d 1328, 1336 (5th Cir. 1981).

[33] It has long been settled that one Congress cannot bind a future Congress, save by constitutional amendment. Each Congress enjoys the free and uninhibited exercise of its constitutionally enumerated powers. See, e.g., Reichelderfer v. Quinn, 287 U.S. 315, 318 (1932).

The views of the preceding paragraph find strong support in two Supreme Court taking decisions dealing, as we have been here, with private actions taken in reliance on government representations later contravened. Ruckelshaus v. Monsanto Co.[34] involved the Environmental Protection Agency's public disclosure and other use of trade secrets submitted by pesticide registration applicants, despite unequivocal statutory prohibition of such uses by EPA. "This explicit governmental guarantee," said the Court, "formed the basis of a reasonable investment-backed expectation,"[35] the frustration of which constitutes a taking if not justly compensated through the statute's arbitration procedure. Similarly, Kaiser Aetna v. United States[36] arose from the Corps of Engineers' consenting to the dredging of a shallow lagoon and its connection to a navigable waterway, for the purpose of constructing an exclusive marina community. After substantial investment by the developers, the Corps informed them that the lagoon, now made navigable, was subject under the navigation servitude to a right of access by the boating public. In finding that the United States would have to pay compensation for such public access, the Court noted that "[w]hile the consent of individual officials representing the United States cannot `estop' the United States, it can lead to the fruition of a number of expectancies embodied in the concept of `property' -- expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property."[37]

In a similar vein, a non-navigability declaration intended to waive the servitude so as to promote development could arguably give rise to reasonable investment-backed expectations, the later frustration of which by the United States would effect a taking.

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[34] 467 U.S. 986 (1984).

[35] Id. at 1011.

[36] 444 U.S. 164 (1979).

[37] Id. at 179.

By contrast, where the investment-backed expectation that the navigation servitude will not be exercised is not "reasonable," Supreme Court decisions point just as strongly to the absence of a taking.[38] Thus, as we inferred earlier from lower federal court cases, the Supreme Court appears unlikely to discern a taking in federal interference with navigable water projects constructed either before a nonnavigability declaration or following its rescission, both situations in which the potential investor is on notice that the servitude may be invoked in the future.[39]

We note but briefly the issue of whether there is any practical difference between a holding that a congressional non-navigability declaration relinquishes the servitude, and a holding that such a declaration is ineffective to surrender the servitude but may nonetheless give rise to constitutionally protected expectations. The answer appears to be no and yes. The navigation servitude being nothing more than a federal power to "take" for navigational purposes without compensating, there is, as a practical matter, no difference between the United States' relinquishing the servitude and its use of the servitude in a manner that, by interfering with protected expectations, effects a compensable taking. Under either theory, the government must pay. On the other hand, there may indeed be a distinction between the two holdings in that under the latter (no relinquishment), it is easier to argue that the United States can reassert the servitude at a later date.

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[38] See, e.g., Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005-1010 (1984).

[39] In the same way, statutory "notice" as to subsequent government behavior led the Monsanto Court to find Monsanto's expectations of trade-secret confidentiality not reasonable with regard to trade secrets it submitted to EPA under the pre-1972 and post-1978 versions of the statute. Id.

The Effect of Express Statutory Reservations

We have thus far ignored the tag line attached to just under one half of the non-navigability declarations. That line states: "The right to alter, amend, or repeal this section is expressly reserved." Research in the available time reveals no legislative history clues as to Congress' intent in this reservation. Possibly Congress feared that non-navigability declarations would be judicially regarded as permanently relinquishing the navigation servitude as to a given waterway segment, and wanted to retain an ability to assert it prospectively at a later date. Or, Congress may have had no doubt that it could assert the servitude prospectively in the future, but wanted to minimize the likelihood that taking-clause compensation would be found owing should Congress later need to assert the servitude retroactively.

Even without any clear signal as to congressional intent, the bald and unequivocal text of the reservation clause might be seen to give sufficiently clear notice of a possible future rescission of non-navigability so as to undercut taking claims based on government interference with reasonable investment-backed expectations. If so, then of course the central conclusion of this memorandum -- that retroactive use of the servitude following a non-navigability declaration may be a taking -- would not apply where such a reservation accompanies the declaration. But at this point we are veering into almost pure speculation; the legal effect of the reservation clause on reassertions of the servitude must be deemed a major question mark.

Summary

The legal effect of non-navigability declarations on (1) the reach of federal regulatory statutes, and (2) the navigation servitude, is discussed. As to application (1), it seems that courts would construe such declarations narrowly and not apply them across-the-board to all navigability-based federal statutes. But to whatever extent such declarations shrink the reach of regulatory statutes, there seems to be no legal impediment, even in the absence of an express reservation of a right to repeal, to Congress' reinstating navigability and thereby restoring the original regulatory breadth.

The effect of non-navigability declarations on later federal invocation of the navigation servitude, item (2) above, can only be inferred; there is no direct precedent. Limited case law involving Corps of Engineers attempts at invocation following surrender, read together with Supreme Court taking law, suggests that taking problems may constrain federal use of the servitude as to investments made while a nonnavigability declaration is in effect. In contrast, research discloses no case-law support for the United States' being precluded from invoking the servitude in a given area with respect to transactions or property rights arising subsequent to statutory reinstatement of navigability.

Express reservations of the right to repeal non-navigability declarations constitute the cloudiest issue. Limited research reveals no clue as to Congress' intent, but the bald and unqualified text of such reservations raises some possibility that their use might undercut a taking claim based on retroactive assertion of the servitude following enactment of a non-navigability declaration.

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